RECORD
AND
BRIEFS

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2014
NO. _____

STEPHEN VOISINE and
WILLIAM ARMSTRONG III,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

14-10154

MOTION TO PROCEED
IN FORMA PAUPERIS

Supreme Court, U.S.
FILED
JUN 04 2015
OFFICE OF THE CLERK

Petitioners, Stephen Voisine and William Armstrong III, through their attorney, Virginia G. Villa, respectfully move the court for permission to proceed in forma pauperis in connection with this Petition for Writ of Certiorari and any subsequent proceedings. Counsel was appointed under the Criminal Justice Act by the district court below and all proceedings since the original indictment all have been pursuant to the Criminal Justice Act, Title 18, United States Code, Section 3006(A), with respect to counsel. Petitioners' financial status have not materially improved since the inception of these proceedings.

Dated: June 4, 2015

Respectfully submitted,

ORIGINAL

VIRGINIA G. VILLA
Attorney for Petitioners
2689 230th Avenue
St. Croix Falls, WI 54024

RECEIVED
JUN 9 - 2015
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Library of Congress
Law Library

No. 14-10154

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2014

STEPHEN VOISINE and
WILLIAM E. ARMSTRONG, III,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Supreme Court, U.S.
FILED
JUN 04 2015
OFFICE OF THE CLERK

ORIGINAL

Virginia G. Villa
Attorney of Record

2689 230th Avenue
St. Croix Falls, WI 54024
(207) 745-6156
villa_virginia@hotmail.com

Attorney for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Does a misdemeanor crime with the *mens rea* of recklessness qualify as a "misdemeanor crime of domestic violence" as defined by 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9)?

2. Are 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9) unconstitutional under the Second, Fifth, and Sixth Amendments and the Ex Post Facto Clause of the United States Constitution?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. None of the parties are corporations.

TABLE OF CONTENTS

	Page
INTRODUCTION	1
OPINIONS BELOW	2
JURISDICTION	3
CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT:	
I. This Court's prior decisions interpreting 18 U.S.C. § 922(g)(9) create conflicts with cases establishing constitutional limits on congressional action; review is necessary to resolve these conflicts	8
A. *Hayes* conflicts with *Castleman*, *Descamps*, *Shepard*, and *Taylor*	9
B. By creating a statute that allows deprivation of firearm rights based on a prior misdemeanor conviction that has no domestic relationship element, and allowing such element to be proven in a later federal proceeding, Congress violated the Fifth and Sixth Amendments	12
C. Section 922(g)(9) conflicts with the Ex Post Facto clause	13
D. *Hayes* conflicts with *Morrison* and the doctrine of limited federal jurisdiction	15
E. Extending § 922(g)(9)'s firearm prohibition to non-violent and reckless misdemeanor convictions impacts a constitutionally protected activity (possession of firearms) based on a factor (a prior misdemeanor conviction) that bears an insufficient nexus to the harm sought to be addressed (domestic firearm violence)	16
i. Section 922(g)(9), applied to reckless or non-violent conduct, cannot withstand strict scrutiny	18
ii. Section 922(g)(9), applied to reckless or non-violent conduct, cannot withstand intermediate scrutiny	20
F. The constitutional issues presented merit review	23
II. The First Circuit's decision to include misdemeanors with the *mens rea* of recklessness in the definition of "use of force" conflicts with decisions of this Court and with those of ten other Circuits	24
A. The First Circuit's interpretation of "use ... of physical force" conflicts with the decision in *United States v. Castleman*, 134 S.Ct. 1405 (2014)	25
B. The interpretation of the phrase "use ... of physical force" adopted by the First Circuit conflicts with that of ten other Circuits	27
CONCLUSION	31
APPENDICES:	
A. First Circuit Opinion in *United States v. Voisine and Armstrong*	
B. Denial of Rehearing and Rehearing En Banc in *Voisine and Armstrong*	
C. Ltr from FBI to Stephen Smith, Esq. dated August 13, 2013	

TABLE OF AUTHORITIES

Cases:	Page
Abrams v. Johnson, 521 U.S. 74 (1997)	18
Armstrong v. United States, 134 S.Ct. 1759 (2014)	2, 3, 24
Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986)	19
Calder v. Bull, 3 U.S. 386 (1798)	14
Citizens United v. FEC, 558 U.S. 310 (2010)	18, 19
Descamps v. United States, 133 S.Ct. 2276 (2013)	8, 9, 10, 11
Dist. of Columbia v. Heller, 554 U.S. 570 (2008)	16, 17, 18
Edenfield v. Fane, 507 U.S. 761 (1993)	21
Engle v. Isaac, 456 U.S. 107 (1982)	16
Fernandez-Ruiz v. Gonzales, 466 F.3d 1121 (9th Cir. 2006)	30
Garcia v. Gonzales, 445 F.3d 465 (4th Cir. 2006)	29
Henderson v. United States, 135 S.Ct. __ (2015)	14
Jimenez-Gonzalez v. Mukasey, 548 F.3d 557 (7th Cir. 2008)	30
Jobson v. Ashcroft, 326 F.3d 367 (2nd Cir. 2003)	29
Johnson v. United States, 559 U.S. 133 (2010)	25
Johnson v. United States, S.Ct. No. 13-7120 (arg. Apr. 20, 2015)	13, 15
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951)	23
Jones v. North Carolina Prisoner's Labor Union, Inc., 433 U.S. 119 (1977)	19
Leocal v. Ashcroft, 543 U.S. 1 (2004)	28, 30
Oyebanji v. Gonzales, 418 F.3d 260 (3rd Cir. 2005)	30
Richardson v. United States, 526 U.S. 813 (1999)	11
Rubin v. Coors Brewing Co., 514 U.S. 476 (1996)	20, 21, 23
Shepard v. United States, 544 U.S. 13 (2005)	10, 11, 24
Taylor v. United States, 495 U.S. 575 (1990)	9, 10, 11, 24

United States v. Aguila-Montes, 655 F.3d 915 (9th Cir. 2001) 11

United States v. Armstrong, 706 F.3d 1 (1st Cir. 2013) 24

United States v. Booker, 644 F.3d 12 (1st Cir. 2011) 24

United States v. Castleman, 134 S.Ct. 1405 (2014) *passim*

United States v. Fish, 758 F.3d 1 (1st Cir. 2014) 28

United States v. Hayes, 555 U.S. 415 (2009) *passim*

United States v. Morrison, 529 U.S. 598 (2000) 16

United States v. Nason, 269 F.3d 10 (1st Cir. 2001) 24

United States v. Palomino-Garcia, 606 F.3d 1317 (11th Cir. 2010) 30

United States v. Portela, 469 F.3d 496 (6th Cir. 2006) 29

United States v. Skoien, 614 F.3d 638 (7th Cir. 2010) 22

United States v. Staten, 666 F.3d 154 (4th Cir. 2011) 20, 22

United States v. Torres-Villalobos, 487 F.3d 607 (8th Cir. 2007) 30

United States v. Voisine, 778 F.3d 176 (1st Cir. 2015) *passim*

United States v. Zuñiga-Soto, 527 F.3d 1110 (10th Cir. 2008) 30

Federal Constitution and Statutes:

U.S. Const., Art. I, § 9, cl. 3 16

U.S. Const., amend. II 17

U.S. Const., amend. V 12

U.S. Const., amend. VI 12

8 U.S.C. § 1101(a)(43)(F) 29

18 U.S.C. § 13 16

18 U.S.C. § 16 28, 29, 30

18 U.S.C. § 16(b) 29

18 U.S.C. § 921(a)(33)(A) *passim*

18 U.S.C. § 922(g)(9) *passim*

18 U.S.C. § 924(e)(2)(B)(ii) 15

18 U.S.C. § 931 28

State Statutes:

17-A M.R.S.A. § 35(3)(A) 26

17-A M.R.S.A. § 35(3)(C) 26

17-A M.R.S.A. § 207 *passim*

17-A M.R.S.A. § 207-A 10

19-A M.R.S.A. § 4002 (4) 6, 10

N.Y Penal Law § 120.05(4) 29

Miscellaneous:

BJS, Patterns and Trends: Homicide in the U.S. Known to Law Enforcement, 2011 (Dec. 2013) 21

BJS, Patterns and Trends: Homicide Trends in the United States, 1980-2008, Annual Rates for 2009 and 2010 (Nov. 2011) 22

"Brooks man who killed wife sentenced to 35 years," Bangor Daily News (Oct. 28, 2011) 19

"Couple's deaths in Fryeburg were murder-suicide, police say," Portland Press-Herald (Jan. 27, 2015) 19-20

Gertner, Nancy, "Sex, Lies and Justice: Can we reconcile the belated attention to rape on campus with due process?" The American Prospect (Jan. 19, 2015) 23

Gruber, Aya, *A Provocative Defense*, 103 Calif. L.R. 273 (2015) 23

"Maine: Man Kills His Wife, 3 Children and Himself," New York Times (Jul. 28, 2014) 19

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2014

STEPHEN VOISINE and
WILLIAM ARMSTRONG III,

Petitioners,

v

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

The petitioners, Stephen Voisine and William Armstrong III , respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceedings on January 30, 2015.

INTRODUCTION

Petitioners challenge their convictions under 18 U.S.C. § 922(g)(9) on statutory and constitutional grounds. If a question can be resolved on statutory grounds, the constitutional question need not be reached. Petitioners first address why the constitutional question should be reviewed to highlight the conflicts this Court's prior decisions have created by giving the statute a very broad reading without contemporaneously considering constitutional questions. In *United States v. Hayes*, 555 U.S. 415 (2009), the Court created a new federal crime of a

misdemeanor crime of domestic violence, all the elements of which need not be plead or proven in the court in which the misdemeanor conviction was had. In *United States v. Castleman*, 134 S.Ct. 1405 (2014), the Court declared that "misdemeanor crimes of domestic violence" include non-violent offensive contact infractions. These decisions divorce the basis of a firearm prohibition from constitutionally created procedural and substantive protections. They also weaken the connection between the purpose of the statute, to decrease firearm violence in domestic situations, from a preceding event, a prior misdemeanor conviction, in that reckless and non-violent acts are poor predictors of future intentional acts of violence.

The First Circuit followed this Court's example of reading the statute broadly. Petitioners request the Court to grant review as statutory matter as this broad reading directly conflicts with binding precedent of this Court. It also creates a conflict within the Circuits regarding the meaning of the phrase "use of force" as contained throughout the federal criminal code. Finally, such broad reading would further weaken the connection between the identified purpose of the statute and the means of reaching that goal. Disconnecting the ends and means renders the statute constitutionally frail. These questions merit review.

OPINIONS BELOW

This case comes back to this Court after remand to the United States Court of Appeals for the First Circuit. *See Armstrong v. United States*, 134 S.Ct. 1759 (2014). The opinion of the Court of Appeals for the First Circuit on remand of the unified cases of Petitioners Voisine and Armstrong is reported at 778 F.3d 176, and is reprinted in the attached Appendix A. Denial of rehearing and rehearing en banc in these cases is unreported and reprinted in the attached Appendix B.

The judgment of the United States District Court for the District of Maine (John A. Woodcock, Jr., C.J.) for both Petitioners Armstrong and Voisine have not been reported and are reprinted in the attached Appendices C and D. The District Court Orders denying the Motion to Dismiss are unpublished and are reproduced in the attached Appendices E and F

JURISDICTION

Petitioners stand convicted by way of conditional guilty pleas in the United States District Court for the District of Maine. The Honorable John A. Woodcock, Jr., Chief United States District Judge for the District of Maine imposed a sentence of three years probation on Petitioner Armstrong. The same judicial officer imposed a sentence of a year and a day on Petitioner Voisine.

The United States Court of Appeals for the First Circuit affirmed in a published opinion as to Petitioner Armstrong and in an unpublished opinion as to Petitioner Voisine filed January 18, 2013. Both men filed petitions for rehearing and rehearing en banc, and both were denied on February 8, 2013.

Petitioners filed a joint petition for certiorari review in this Court on May 6, 2013. The Petition was granted, the judgment of the First Circuit vacated and the cases remanded for reconsideration in light of *United States v. Castleman*, 134 S.Ct. 1405 (2014) by Order entered March 31, 2014. *See Armstrong v. United States*, 134 S.Ct. 1759 (2014).

The First Circuit again re-affirmed the convictions in a published opinion entered on January 30, 2015. Petitioners filed a petition for rehearing and rehearing en banc on February 13, 2015. The First Circuit denied the petition on March 30, 2015.

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

U.S. Const., Article I, Sec. 9, Cl. 3:

No bill of attainder or ex post facto Law shall be passed.

U.S. Const., amend. II:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const., amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., amend VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. § 921(a)(33)(A):

Except as provided in subparagraph (c), the term "misdemeanor crime of domestic violence" means on offense that--

(i) is a misdemeanor under Federal, State, or Tribal law; and

(ii) has as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. § 922(g)(9):

It shall be unlawful for any person--

***

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

17-A M.R.S.A. § 207 (Assault):

1. A person is guilty of assault if:

A. The person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person. Violation of this paragraph is a Class D crime ...

17-A M.R.S.A. § 207-A (Domestic Violence Assault):

1. A person is guilty of domestic violence assault if:

A. The person violates section 207 and the victim is a family or household member as defined in Title 19-A, section 4002, subsection 4. Violation of this paragraph is a Class D crime ...

19-A M.R.S.A. § 4002:

4. Family or household members. "Family or household members" means spouses or domestic partners or former spouses or former domestic partners, individuals presently or formerly living together as spouses, natural parents of the same child, adult household members related by consanguinity or affinity or minor children of a household member when the defendant is an adult household member and, for the purposes of Title 15, section 1023, subsection 4, paragraph B-1 and Title 15, section 1094-B, this chapter and Title 17-A, sections 15, 207-A, 209-A, 210-B, 210-C, 211-A, 1201, 1202 and 1253 only, includes individuals presently or formerly living together and individuals who are or were sexual partners. Holding oneself out to be a spouse is not necessary to constitute "living as spouses." For purposes of this subsection, "domestic partners" means 2 unmarried adults who are domiciled together under long-term arrangements that evidence a commitment to remain responsible indefinitely for each other's welfare.

STATEMENT OF THE CASE

1. Petitioner Voisine pled guilty on February 2, 2004 to a misdemeanor simple assault conviction pursuant to 17-A M.R.S.A. § 207(1)(A). The charging document to which he pled guilty alleged the crime in generic terms, stating that he "did intentionally, knowingly, or recklessly, cause bodily injury or offensive physical contact" to the named victim. The state court plea colloquy exists of a single page in which Mr. Voisine's lawyer informed the court that the matter would result in a

plea pursuant to a negotiated settlement of a two hundred dollar fine, and that Mr. Voisine understood this was the negotiated settlement.

2. Petitioner Voisine came to the attention of federal authorities in 2009 in relation to an investigation of his shooting an immature bald eagle. In examining his criminal history, federal authorities noticed Petitioner Voisine's prior conviction for simple assault dating from 2004.

3. Petitioner Armstrong pled guilty on December 30, 2008 to a misdemeanor Domestic Violence Assault under Maine statute 17-A M.R.S.A. 207-A(1)(A), which incorporates simple assault and adds a relationship element. The charging document to which he pled guilty alleged the simple assault portion of the offense in generic terms, stating that he "did intentionally, knowingly, or recklessly, cause bodily injury or offensive physical contact" to the named victim, and added that this "conduct was committed against a family or household member as defined by 19-A M.R.S.A. § 4002(4)." The relationship between the named victim and Petitioner was not set forth in the charging document. The prosecutor recited no factual basis for the plea, but only recorded that it was due to an offer to recommend a sentence of 180 days, with all but 24 hours suspended (time served), one year of probation, and a $10 fee. After pleading guilty, Petitioner was released and returned home. Petitioner completed the state-imposed term of probation without incident.

4. In May, 2010, based on an unrelated investigation, Maine State Police obtained a search warrant for Petitioner Armstrong's residence. During execution of the warrant on May 11, 2010, the police noticed numerous firearms and ammunition. The officers reported the presence of the firearms and ammunition to the Bureau of Alcohol, Tobacco and Firearms [ATF]. No criminal charges resulted from the state search warrant.

5. Based on the report of firearms in Petitioner Armstrong's household, and having confirmed his misdemeanor assault conviction from 2008, ATF agents obtained a federal search warrant for Petitioner's household. Searching officers recovered ammunition, and later (with Petitioner Armstrong's help) discovered firearms belonging to him at the residence of a friend of the family. ATF agents left the seven firearms identified as belonging to Petitioner Armstrong at the friend's residence with instructions not to return them to Petitioner Armstrong.

6. An Information charging one felony count of possession of firearms in violation of 18 U.S.C. § 922(g)(9) and one misdemeanor count of killing a bald eagle was filed against Petitioner Voisine on March 11, 2011. An Indictment charging Petitioner Armstrong with possession of firearms in violation of 18 U.S.C. § 922(g)(9) based on the 2008 assault conviction was filed in the United States District Court for the District of Maine on April 13, 2011.

7 Petitioners moved to dismiss on two grounds: for failing to state a federal offense in that a recklessly committed offensive physical contact does not meet the definition of a "misdemeanor crime of domestic violence," and that, if such a conviction satisfies the statutory definition, the statute is rendered unconstitutional as abrogating a Second Amendment right without a sufficient basis for doing so. The District Court denied the motions by an order entered on July 8, 2011 for Petitioner Armstrong and on April 14, 2012 for Petitioner Voisine. Petitioners entered pleas conditioned on their right to appeal the denial of the motions to dismiss. The District court sentenced Petitioner Voisine to a year and a day in prison and a $100 special assessment on February 13, 2012, and sentenced Petitioner Armstrong to three years probation, a $2,500 fine and a $100 special assessment on February 14, 2012.

8. On the initial appeal, Petitioners challenged their convictions based on statutory interpretation grounds and the Second and Fifth Amendments.

9. The United States Court of Appeals for the First Circuit affirmed in a published opinion as to Petitioner Armstrong and an unpublished opinion as to Petitioner Voisine filed on January 18, 2013. Both men filed petitions for rehearing and rehearing en banc, which were denied on February 8, 2013. They filed a joint petition for certiorari with this Court on May 6, 2013.

10. This Court entered an order on March 31, 2014 granting the petition, vacating the judgment of the First Circuit, and remanding for reconsideration in light of the decision in *United States v. Castleman*, 134 S.Ct 1405 (2014).

11. On remand, Petitioners argued that the issue as to whether reckless conduct could be encompassed in the phrase "use ... of physical force" was foreclosed by the decision of this Court *United States v. Castleman*, 134 S.Ct. 1405 (2014). Petitioners also raised a new constitutional argument based on the intervening decision in *Descamps v. United States*, 133 S.Ct. 2276 (2013). The First Circuit, in a split decision, rejected these arguments on substantive grounds and again affirmed. The Court denied a petition for rehearing and rehearing en banc on March 30, 2015. Petitioners again seek review in this Court.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT'S TWO PRIOR DECISIONS INTERPRETING 18 U.S.C. § 922(G)(9) CREATE CONFLICTS WITH CASES ESTABLISHING CONSTITUTIONAL LIMITS ON CONGRESSIONAL ACTION; REVIEW IS NECESSARY TO RESOLVE THESE CONFLICTS

The decision in *United States v. Hayes*, 555 U.S. 415 (2009) created an extraordinary statutory framework otherwise unknown in American jurisprudence: it held that for 18 U.S.C. §921(a)(33)(A), "the domestic relationship, although it must be established beyond a reasonable doubt in a § 922(g)(9) firearms possession

prosecution, need not be a defining element of the predicate offense." *Id.*, 555 U.S., at 418, *see also United States v. Voisine*, 1st Cir. No. 12-1213, slip op. at 27 (1st Cir. 2015)(rejecting constitutional challenge based on Fifth and Sixth Amendments), Appx. A. The curiousness of this result becomes apparent when one realizes that Section 922(g)(9) mentions no element regarding a domestic relationship, but only predicates a firearms prohibition on a prior misdemeanor conviction. The domestic relationship element appears only in the definition in Section 921. This definition limits the type of qualifying misdemeanor conviction. Separating the domestic relationship element from the underlying conviction presents real, and continuing, conflict with other decisions of this Court interpreting procedural protections, as well as substantive limits, established by the Constitution. This conflict can only be resolved by this Court.

A. *Hayes* conflicts with *Castleman, Descamps, Shepard,* and *Taylor*:

The decision in *United States v. Castleman*, 134 S.Ct. 1405 (2014), presumes that the categorical approach first announced in *Taylor v. United States*, 495 U.S. 575 (1990) applies to Section 922(g)(9). *See Castleman*, 134 S.Ct., at 1413. The most recent interpretation of the limitations exacted by *Taylor* was announced in *Descamps v. United States*, 133 S.Ct. 2276 (2013). The federal indictment charged Stephen Voisine with a violation of 18 U.S.C. § 922(g)(9) and listed a single qualifying predicate: a 2004 conviction for simple assault. The Maine statute under which he was convicted lists no element of domestic relationship. *See* 17-A M.R.S.A. § 207. The criminal complaint and the plea colloquy are silent as to the relationship between Petitioner Voisine and the named victim. All of the documents present in the prior conviction contain nothing regarding a necessary element of a qualifying conviction: the domestic relationship. The domestic

relationship was not established until the federal proceeding. *Hayes* allows this procedure.

That such procedure conflicts with the decision in *Descamps* can be seen if one substitutes the particulars of Voisine for those in *Descamps*:

> The modified approach thus has no role to play in this case. The dispute here does not concern any list of alternative elements. Rather, it involves a simple discrepancy between generic [misdemeanor crime of domestic violence] and the crime established in § [207]. The former requires a [limited number of domestic relationships]. The latter does not, and indeed covers simple [battery against a stranger.] In *Taylor 's* words, then, § [207] "define[s] [simple assault] more broadly" than the generic offense. 495 U.S., at 599, 110 S.Ct. 2143. And because that is true—because [Maine], to get a conviction, need not prove that [Voisine battered his domestic partner]—a § [207] violation cannot serve as [a § 922(g)(9)] predicate. Whether [Voisine] *did* [batter his domestic partner] makes no difference. And likewise, whether he ever admitted to [battering his domestic partner] is irrelevant.

Id., 133 S.Ct., at 2285-2286 (alterations added, emphasis in original). Due to the number of people convicted of simple assault prior to (and after) Maine's adoption of a domestic violence assault statute in 2007, those convicted of a violation of 17-A M.R.S.A. § 207 fall into Petitioner Voisine's situation.

For Petitioner Armstrong, the *Hayes* procedure conflicts with *Shepard v. United States*, 544 U.S. 13 (2005). Petitioner Armstrong's prior conviction was had under 17-A M.R.S.A. § 207-A, which covers domestic violence assault in Maine. This statute adds to simple assault the element of a domestic relationship, which by statute includes "adult household members related by consanguinity," 19-A M.R.S.A. § 4002(4). This means a conviction under 17-A M.R.S.A. § 207-A may be had for an assault against a sibling, aunt, or other relative not included in 18 U.S.C. § 921(a)(33)(A). Mr. Armstrong's federal Indictment lists one conviction from 2008 as the predicate offense. The criminal complaint named a victim but did not allege if she is the Petitioner's wife, sister, aunt, or other female relative. The state court change of plea transcript only referred to her as "Ms. Armstrong" but did not identify the relationship between the two.

As in Mr. Voisine's case, the domestic relationship was established only in the federal proceeding. No document created in the prior Maine state court proceeding evinced this element. This is a procedure specifically forbidden in *Shepard*. "Our decisions authorize review of the plea colloquy or other approved extra-statutory documents only when a statute defines [domestic violence assault] not (as here) overbroadly, but instead alternatively, with one statutory phrase corresponding to the generic crime and another not. In that circumstance, a court may look to the additional documents to determine which of the statutory offenses (generic or non-generic) formed the basis of the defendant's conviction." *Descamps*, 133 S.Ct., at 2286. *Hayes* envisioned using other documents or types of proof due to the absence of a domestic relationship element in a number of state jurisdictions. It conflicts with *Castleman* and the line of cases which began with *Taylor* because it does not limit evidence to judicial documents created in the prior proceeding.

The simple answer to why *Hayes* does not follow *Taylor* and its progeny is because those cases were predicated on the notion that Fifth and Sixth Amendment violations occur if a necessary element of a prior conviction is established by a judicial factfinder in a later proceeding by a preponderance of the evidence. As set forth in *Descamps:*

> Our modified categorical approach merely assists the sentencing court in identifying the defendant's crime of conviction, as we have held the Sixth Amendment permits. But the Ninth Circuit's reworking authorizes the court to try to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct. *See [United States v.] Aguila-Montes*, 655 F.3d [915], ... 937 [(9th Cir. 2001)]. And there's the constitutional rub. The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances. *See, e.g., Richardson v. United States*, 526 U.S. 813, 817, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999). Similarly, as *Shepard* indicated, when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment.

Id., 133 S.Ct. at 2288 (alterations added). *Hayes* commands that the domestic relationship element must be found by a jury, albeit one that sits in a later, separate, proceeding. The timing of the *later* jury guarantee in *Hayes* as to a necessary element of a *prior* conviction creates other, serious, constitutional infirmities.

B. By creating a statute that allows deprivation of firearm rights based on a prior misdemeanor conviction that has no domestic relationship element, and allowing such element to be proven in a later federal proceeding, Congress violated the Fifth and Sixth Amendments:

A person shall not "be deprived of life, liberty, or property" without due process of law. U.S. Const., amend. V In criminal proceedings, "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." U.S. Const., amend. VI. Under the construction of Section 922(g)(9) set forth in *Hayes*, *all* persons with *any* misdemeanor assault conviction are banned from possessing firearms, even those whose convictions were not domestic violence cases.

This result of *Hayes* is confirmed by the interpretation given to the ruling by the Federal Bureau of Investigation, whose responsibility it is to administer the national instant-check system required when a firearm is purchased from a federally licensed dealer. As can be seen by the letter contained in Appendix G, the FBI includes as prohibitory convictions misdemeanors such as Disorderly Conduct, even though the listed elements of the conviction have no domestic relationship element. *See id.* This is a reasonable interpretation, in that Section 922(g)(9) only

requires a prior conviction. The *Hayes* decision separated out the domestic relationship element for later prosecution.

The practical effect of *Hayes* is to have all non-violent misdemeanor convictions act as prohibiting convictions. Although § 922(g)(9) seems to prohibit those with a prior misdemeanor crime of *domestic* violence, *Hayes* held that the domestic relationship need not be an element of the prior offense of conviction. Only those with prior convictions qualify for the prohibition. *See* 18 U.S.C. § 922(g)(9). *Hayes* allows a firearm prohibition of all persons having a prior conviction for a misdemeanor crime based on facts unrelated to the elements of prior conviction. *See* Letter, Appx. G. Such persons become prohibited with *no* jury *ever* having found the necessary statutory elements and the burden of proof shifts to the firearm purchaser. This process abrogates the Fifth Amendment Due Process Clause and the Sixth Amendment jury clause. Creating the prohibition upon conviction of an offense with less than all necessary elements deprives persons of liberty and property interests without any *contemporaneous* proceeding in which to establish the prohibiting element.

It also violates the Sixth Amendment notice clause. By separating the element of a domestic relationship from the underlying offense, a person would understandably be unaware that she has been convicted of such a crime. In fact she has not been so convicted, because a necessary element has not been established. But she will be treated as if she has been convicted; otherwise the prior conviction rule cannot be administered within the instant check system.[1]

C. Section 922(g)(9) conflicts with the Ex Post Facto clause:

---

[1]The Court currently is considering the constitutional problems involved in creating predicate convictions based on conduct independent of the elements of a prior conviction in *Johnson v. United States*, S.Ct. No. 13-7120 (argued April 20, 2015).

As discussed above, reading *Hayes* as prohibiting firearm possession as to all misdemeanants, where the federal statute requires a domestic relationship as an element, creates Fifth and Sixth Amendment problems. If this is not a correct reading of *Hayes*, then no person with a misdemeanor convictions is prohibited *until* the domestic relationship element has been pled and proven in the federal proceeding. It is this latter scenario that *Hayes* appears to contemplate. This reading also renders conduct that was legal at the time it occurred into a criminal act at a later date.

If all persons prosecuted pursuant to § 922(g)(9) *cannot* have the required prior conviction until the fact-finder in the federal proceeding has established the necessary domestic relationship, possession of firearms at the time charged (which always proceeds the fact-finding stage of federal proceedings) was legal and remains legal until the final element of the prior conviction has been proven. Yet, "No bill of attainder or ex post facto Law shall be passed." U.S. Const., Article I, Sec. 9, Cl. 3. An ex post facto law makes an act, legal when performed, subsequently illegal. *See Calder v. Bull*, 3 U.S. 386, 390 (1798)(holding that the Ex Post Facto clause prohibits "Every law that makes an action ... innocent when done, criminal; and punishes such action"). Pursuant to *Hayes*, Petitioners' acts of possession of firearms was legal (because they did not have the required prior conviction), up until the dates of their conditional guilty pleas, at which time they both admitted the element of the appropriate domestic relationship. At the time of their conditional guilty pleas they no longer possessed firearms. *See Henderson v. United States*, 135 S.Ct. __ (May 18, 2015)(holding that firearms in the possession of law enforcement or third parties do not constitute "possession" within the meaning of 18 U.S.C. § 922(g) as long as a defendant does not exercise control over the firearm).

This is a classic Ex Post Facto scenario, in that it makes an action, the possession of firearms, legal at the time committed (due to the absence of all elements of a qualifying conviction), illegal at a later date (the conditional guilty plea proceeding), without the defendant having repeated the conduct after the prohibiting event occurred. Petitioners have been punished for possessing firearms at a time when they did not have qualifying prior convictions and therefore could lawfully possess them. They did not possess firearms by the time they were convicted of a qualifying predicate offense. The Constitution forbids this punishment.

D. *Hayes* conflicts with *Morrison* and the doctrine of limited federal jurisdiction:

The separation of the domestic element from the underlying misdemeanor conviction has yet another constitutional problem: limits on the extent of federal jurisdiction. Where a prior conviction has federal consequences, all of the elements of that prior conviction usually must be established in the prior proceeding.[2] *Hayes* held that the element of domestic relationship can be proven in a subsequent federal prosecution. *Hayes* thus recognized that a "misdemeanor crime of domestic violence" consists of elements passed by state legislatures, as well as an additional element (the domestic relationship) passed by Congress. If the state law did not establish a qualifying predicate crime (the problem identified in *Hayes*), then Congress did so.

---

[2]One exception is the creation of categories of crimes that are not enumerated in the federal statute, such as occurs in catch-all provision in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii)(including as a predicate conviction any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another"). This provision has spawned a number of decisions trying to establish a workable system for determining which crimes fit within its purview, and most recently has caused this Court to consider whether the statute is unconstitutionally vague. *See Johnson v. United States*, S.Ct. No. 13-7120 (argued April 20, 2015).

Our Constitution is a charter for a federal government of limited powers. Under this charter the "States possess primary authority for defining and enforcing the criminal law." *Engle v. Isaac*, 456 U.S. 107, 128 (1982). If an assault is not committed within the confines of territories with special federal criminal jurisdiction, *see e.g.* 18 U.S.C. § 13 (Assimilated Crimes Act), then it *cannot*, consistent with the Constitution, be prosecuted in federal court.

The Constitution gives Congress the power to regulate interstate commerce, U.S. Const., Art. I, § 8, cl. 3, and it can regulate commerce in firearms. Congress can preclude a person who is a felon from receiving or possessing a firearm that has moved in interstate commerce. *See Dist. of Columbia v. Heller*, 554 U.S. 570, 626 (2008). Congress cannot create a generally applicable misdemeanor crime of domestic violence under the Commerce Clause. *See United States v. Morrison*, 529 U.S. 598 (2000)(holding that section of Violence Against Women Act allowing for federal civil remedy for gender-based violence unconstitutional as exceeding federal authority). In other words, Congress cannot create the underlying misdemeanor crime in non-federal enclaves and then proscribe firearm transactions based on that crime. The decision in *Hayes* permits this otherwise proscribed action by converting an element of a qualifying conviction into a matter of exclusive federal legislation.

E. Extending § 922(g)(9)'s firearm prohibition to non-violent and reckless misdemeanor convictions impacts a constitutionally protected activity (possession of firearms) based on a factor (a prior misdemeanor conviction) that an bears insufficient nexus to the harm sought to be addressed (domestic firearm violence)

Some of the greatest challenges we face as a nation is to address identifiable threats with a reasoned response. Petitioners do not dispute that "Firearms and domestic strife are a potentially deadly combination nationwide." *Hayes*, 555 U.S., at 427 They do dispute that non-violent, reckless misdemeanor convictions accurately predict future domestic firearm violence. The Court in *Castleman*

extended the definition of a "misdemeanor crime of domestic violence" to one that includes non-violent conduct on the premise that Congress meant to give Section 922(g)(9) a broad reading. The First Circuit extended this reasoning to include reckless offenses. The question presented is whether such a broad application follows constitutional limitations on congressional action.

Castleman noted that "This country witnesses more than a million acts of domestic violence, and hundreds of deaths from domestic violence, each year." *Id.*, 134 S.Ct., at 1408. The Court did not factor into this equation the number of deaths from domestic violence preceded by non-violent misdemeanor convictions, or deaths perpetrated without a firearm. Even taking the numbers cited by the Court at face value, the rate of assaults compared to the rate of deaths in any one year is approximately one in one thousand. If one looks through the telescope from the end-point of a crime of violence committed with a firearm, one may find prior instances of domestic battery. If one looks through the other end of the telescope, beginning with the pool of those convicted of domestic battery, one must search far and wide to find an instance of firearm violence. The question presented is whether a misdemeanor conviction is a sufficiently precise predictor of those who will engage in domestic misconduct with a firearm to survive constitutional scrutiny.

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., amend. II. In *District of Columbia v. Heller*, *supra*, this Court established that the Second Amendment protected an individual's right to possess and carry firearms. *See id.*, 554 U.S., at 592. The Court so held even though "[they were] aware of the problem of handgun violence in this country, and [they took] seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution." *Id.*, at 636 (alterations added). Prohibiting firearm possession nationally

would undoubtedly reduce firearm violence. *Heller* decided that individual rights, as recognized in the Constitution, trump wholesale disarmament. The question presented by *Castleman* and the First Circuit's decision in *Voisine* is whether *Heller* forecloses a broad based ban on firearm possession for reckless and non-violent misdemeanor convictions. The case presents this question because the numbers recited in *Castleman* indicate that most "domestic violence assaults," as defined in *Castleman*, are committed by persons who will never physically harm a loved one.

i. Section 922(g)(9), applied to non-intentional or non-violent conduct, cannot withstand strict scrutiny

There are normally three levels of scrutiny that may apply to legislation challenged as unconstitutional: strict scrutiny, intermediate scrutiny, and rational basis review. If a rational basis inquiry controlled, then because firearms are dangerous weapons and because domestic strife can lead to injury, limiting access of firearms to those involved in any domestic strife is a rational response. This Court held that a rational basis level of review cannot be applied to Section 922(g)(9). *See Heller*, 554 U.S., at 628, n. 27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect").

This leaves the Court with either of two levels of scrutiny that can apply: strict or intermediate. "Strict scrutiny" requires that a statute or regulation "be narrowly tailored to serve a compelling governmental interest in order to survive" a constitutional challenge. *Abrams v. Johnson*, 521 U.S. 74, 91 (1997). Cases applying strict scrutiny all relate to core constitutional rights. This Court applied strict scrutiny in striking down certain election laws prohibiting a class of speaker (corporations) from any political speech. *See Citizens United v. FEC*, 558 U.S. 310 (2010). In determining that the law at issue must be subjected to strict scrutiny,

the Court indicated that political speech was the target of the law in question, striking at the core function of the First Amendment. It did not matter that the proscription applied to a "disfavored speaker," namely corporations, but rather that the ban, backed by criminal sanctions, proscribed a core constitutional interest. Where the Court has applied a lesser standard of scrutiny, it has balanced the nature of the speech against narrowly identifiable government interests, such as prison security, *see e.g., Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129 (1977), or the integrity of public school education. *See e.g. Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

The law at question here arguably strikes at the core interest protected by the Second Amendment: the right to keep firearms in the home. Section 922(g)(9) does not proscribe all firearm possession, just as the law at issue in *Citizens United* did not proscribe all political speech. Both laws target "disfavored" populations: corporations in one instance, and those convicted of misdemeanors in the other.

As in *Citizens United*, it is the "narrow tailoring" that is absent in Section 922(g)(9). Taking Maine as an example, documented cases of domestic violence homicide can occur where the perpetrator has no prior conviction or documented evidence of domestic violence. For instance, in a highly publicized case in which a man shot his wife of 30 years, there had been no indication of prior domestic violence, according to the prosecuting attorney. See "Brooks man who killed wife sentenced to 35 years," Bangor Daily News (October 28, 2011).[3] In other notable cases, no incidence of prior domestic arrests are listed. See "Maine: Man Kills His Wife, 3 Children and Himself," New York Times (July 28, 2014);[4] "Couple's deaths

---

[3]Available online at http://bangordailynews.com/2011/10/28/news/midcoast/brooks-man-who-killed-wife-sentenced-to-35-years/

[4]Available online at http://www.nytimes.com/2014/07/29/us/maine-man-kills-his-wife-3-children-and-himself.html?_r=0

in Fryeburg were murder-suicide, police say," Portland Press-Herald (January 27, 2015).[5] Although this last article indicates that 14 of the 21 homicides in Maine during 2014 were due to domestic violence, there is no corresponding information regarding how many of those incidents were preceded by misdemeanor convictions involving aggression of the perpetrator toward the victim. Also, there is no information that the 14 domestic homicide cases all involved firearms. If the five homicides noted in the article from 2014 (where there was no prior conviction) are included in the 14 domestic violence deaths noted in the last article, then such numbers lose their persuasive impact in promoting disarmament based on a prior misdemeanor conviction.

There are many who, like Petitioners, have misdemeanor convictions for non-violent reckless offenses who have never physically harmed their loved ones. The statute is both over-inclusive (as it includes too many who engage in no harm to family members), and under-inclusive (as failing to include those who have no prior conviction). A jacket that has arms too long and a waist too small is hardly a good fit.

ii. Section 922(g)(9), applied to non-intentional or non-violent conduct, cannot withstand intermediate scrutiny:

The question may be closer in an intermediate scrutiny context. *See e.g. United States v. Staten*, 666 F.3d 154 (4th Cir. 2011)(rejecting as-applied Second Amendment challenge on intermediate scrutiny basis). In this analysis, the Government must show a "substantial relationship" between the policy to be addressed and the law being scrutinized. In the realm of First Amendment cases, intermediate scrutiny has been applied where the nature of speech was a step removed from that targeted by the First Amendment, for instance, commercial

---

[5]Available online at http://www.pressherald.com/2015/01/27/police-investigating-2-deaths-in-fryeburg/

speech as opposed to political speech. In *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1996), the Court evaluated the constitutionality of a provision of the Federal Alcohol Administration Act that prohibited beer labels from displaying alcohol content. According to the Court, the analysis of the provision's constitutionality must focus on "the substantiality of the interest" in question, *id.*, at 483, and whether the provision advanced that interest "in a direct and material way." *Id.*, at 491. To meet its burden, the government had to provide "proof that its means will alleviate the real harms to a material degree." *Id.* at 487, citing *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993). The government failed to satisfy this "critical" requirement and the Court struck down the provision. *See Rubin*, 514 U.S. at 487.

It has been almost 20 years since Section 922(g)(9) was enacted and it would appear that the effectiveness of this section in preventing domestic homicides should be apparent. It is not. We do not understand the factors that drive homicide statistics. "In 2011, an estimated 14,610 persons were victims of homicide in the United States, according to FBI data on homicides known to state and local law enforcement (figure 1). This is the lowest number of homicide victims since 1968, and marks the fifth consecutive year of decline." BJS, Patterns & Trends: Homicide in the U.S. Known to Law Enforcement, 2011, Figure 1 (Dec. 2013).[6] The overall rate of homicides has steadily decreased over time, except for a "bulge" from approximately 1973 to 1993. *See id.* Although the rate at which homicides occur has decreased almost by half between 1992 and 2011, the percentage of homicides committed with firearms has remained approximately the same at 67 percent. *See id.* (highlights section). This means that the number of homicides per 100,000 persons has decreased, although the percentage of those homicides committed with firearms has remained static.

---

[6]Available online at http://www.bjs.gov/content/pub/pdf/hus11.pdf

Section 922(g)(9) took effect in 1996. According to records maintained by two organizations, the rate of homicides committed by intimate partners *with firearms* decreased as much between 1980 and 1996 as it did from 1996 to 2008 (decreasing 13 percent before 1996 and 13 percent after 1996). *See* BJS, Patterns & Trends: Homicide Trends in the United States, 1980-2008 Annual Rates for 2009 and 2010 at 17 and figure 25a (Nov. 2011). This statistic implies that the cause of a decrease in intimate partner homicide with firearms was decreasing prior to any prohibition created by § 922(g)(9), and that the rate of decrease has not been materially affected since its enactment. The lack of a demonstrable effect may stem from selecting as predicate a "misdemeanor crime of domestic violence" that does not positively correlate to firearm misuse. Whether the Government can establish the necessary "substantial relationship" does not appear supported by these statistics. It is especially problematic where the Fourth and Seventh Circuits depended on Section 922(g) reaching only misdemeanors involving actual violence in upholding the statute against constitutional challenges. *See Staten*, 666 F.3d, at 162-163; *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010)(en banc).

The response to the statistical argument may be: there is still violence against women and it is still an evil that Congress may address through legislation such as Section 922(g)(9). The rebuttal to this response is as follows:

> It is ... laudable that feminists hope to shape a criminal law that embodies values of gender equality and nonviolence. However, equality is a moving target that can be invoked to support various normative goals. If feminists are truly committed to reducing hierarchy and subordination, they should reevaluate whether pursuing the opaque mantle of equality through greater penal severity actually does so. Moreover, the commitment to nonviolence, while unquestionably noble in theory, does not necessarily lead to a world with less suffering. In fact, police, prosecutors, and politicians' efforts to control private violence through the criminal law have arguably constructed a world of acceptable, if not glorified, institutional violence. It is thus time to take a critical look at what the discourse of "violence hath wrought." More importantly, I hope that this Article is part of a larger conversation encouraging progressives—including feminists, humanitarians, and critical race theorists—to be more circumspect about prosecutorial

> solutions to gendered harms and racialized violence. The link between social problems and criminal law solutions is not natural, obvious, or required. It is the product of a larger neoliberal framework that has predicated the decimation of social welfare and our current excess of imprisonment.

Gruber, Aya, *A Provocative Defense*, 103 Calif. L.R. 273, 332-333 (2015). "It isn't necessary to jettison every modicum of a fair process to redress decades-long inattention to these issues. It never is. ... [W]e should not substitute a regime in which women are treated without dignity for one in which those they are accusing are similarly demeaned. Indeed, feminists should be concerned about fair process, not just because it makes fact-findings more reliable and more credible, but for its own sake." Gertner, Nancy, "Sex, Lies and Justice: Can we reconcile the belated attention to rape on campus with due process?" The American Prospect (Jan. 19, 2015).[7] Congress may choose to spend money in order to afford relief to those who experience domestic violence, as well as to analyze its causes and offer programs to promote the cessation of domestic violence. Banning those with misdemeanor convictions from firearm possession does not appear to offer a "substantial means [that] will alleviate the real harms to a material degree." *Rubin*, 514 U.S., at 487

F. The constitutional issues presented merit review

Important issues of constitutional law are implicated in the construction given §§ 921(a)(33)(A) and 922(g)(9) provided in *Hayes, Castleman*, and *Voisine*. "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 179 (1951)(Douglas, J., concurring). Besides the procedural questions, there lurks the underlying substantive issue on

---

[7]Available online at http://prospect.org/article/sex-lies-and-justice

Congress's ability to divest large populations of Second Amendment rights, the means the federal government may take to preventing violent crime, and the effectiveness of its efforts to address legitimate concerns. These issues directly affect the convictions obtained against Petitioners. The issues were presented to, and rejected by, the First Circuit. Due to the continuing nature of the issues, review is merited.

II.

THE FIRST CIRCUIT'S DECISION TO INCLUDE MISDEMEANORS WITH THE *MENS REA* OF RECKLESSNESS IN THE DEFINITION OF "USE OF PHYSICAL FORCE" CONFLICTS WITH DECISIONS OF THIS COURT AND WITH THOSE OF TEN OTHER CIRCUITS

Petitioners' statutory argument centers on the proposition that an undifferentiated conviction based on 17-A M.R.S.A. § 207(1)(A) does not meet the definition of a "misdemeanor crime of domestic violence" for purposes of 18 U.S.C. § 922(g)(9) as the Maine statute allows conviction based on a *mens rea* of recklessness. There is no factual basis in either of Petitioners' prior misdemeanor convictions. Reviewing courts are required to consider that the convictions were for the least serious included offense, namely, recklessly causing offensive physical contact. *See Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2005). The First Circuit has continuously held that any means of committing a simple assault under Maine law, including by reckless conduct, constitutes a proper § 922(g)(9) predicate. *See United States v. Nason*, 269 F.3d 10 (2001); *United States v. Booker*, 644 F.3d 12,16 (1st Cir. 2011); *United States v. Armstrong*, 706 F.3d 1 (1st Cir. 2013), *rem.* 134 S.Ct. 1759 (2014), *aff'd sub nom. United States v. Voisine*, 778 F.3d 176 (1st Cir. 2015).

Petitioners previously requested this Court to consider whether a prior conviction based on reckless conduct resulting in offensive physical contact can

support a § 922(g)(9) prosecution. The Court remanded these cases to the First Circuit for reconsideration in light of the decision in *United States v. Castleman*, 134 S.Ct. 1405 (2014). *See Armstrong v. United States*, 134 S.Ct. 1759 (2014). The First Circuit adopted the approach of *Castleman* to give the statute a broad interpretation. The initial problem with this analysis is that it conflicts with the actual holding of *Castleman*. A secondary one is that it conflates volition with purposefulness, a separation which courts have recognized as determinative where "use of force" is a statutory phrase. The significance of these conflicts merit review by this Court.

A. The First Circuit's interpretation of "use ... of physical force" conflicts with the decision in *United States v. Castleman*, 134 S.Ct. 1405 (2014)

As stated by this Court, *Castleman* concerned "the meaning of one phrase ... 'the use ... of physical force.'" *Id.*, 134 S.Ct., at 1408. In resolving this issue, the Court held "that Congress incorporated the common-law meaning of 'force'—namely, offensive touching—in § 921(a)(33)(A)'s definition of a 'misdemeanor crime of domestic violence.'" *Id.*, at 1410. Based on this explicit holding, the parties below agreed that, "under Castleman, the term 'use of physical force' also incorporates the common law *mens rea* for battery." *Voisine*, slip op. at 16, Appx. A. The First Circuit, however, declined "the parties' invitation to define the *mens rea* of a common law battery independent of the interpretation Maine gives its own statute." *Id.*

That a battery is an intentional crime under the common law was settled in *Johnson v. United States*, 559 U.S. 133 (2010). *Johnson* held that it was "unlikely" that Congress meant to incorporate into the definition of a "'violent felony' a phrase that the common law gave peculiar meaning only in its definition of a misdemeanor," *Id.*, at 141. However, because Section 922(g)(9), unlike Section

924(e), targeted misdemeanants rather than felons, *Castleman* held that "it makes sense for Congress to have classified as a 'misdemeanor crime of domestic violence' *the type of conduct* that supports a common-law battery conviction." *Castleman*, 134 S.Ct., at 1411 (emphasis added). That "conduct" consists "of the intentional application of unlawful force against the person of another." *Johnson*, 559 U.S., at 139.

In deciding that recklessly causing offensive physical contact qualifies as a § 922(g)(9) predicate, the First Circuit analyzed the definition of "reckless conduct" set forth by statute in Maine. It held that, although Maine law also has a separate definition for intentional conduct, reckless conduct involves a sufficient level of volition pursuant to the Maine definition to render it "intentional enough":

> Whatever the common law meaning of battery as to recklessness, Maine characterizes recklessness as a *mens rea* involving a substantial amount of deliberateness and intent. The statutory definition requires that a person "consciously disregard[] a risk that the person's conduct will cause" the result. Me. Rev. Stat. Ann. tit. 17-A § 35(3)(A) (emphasis added). The disregard of the risk is "viewed in light of the nature and purpose of the person's conduct and the circumstances known to the person." *Id.* § 35(3)(C) (emphasis added). Further, it must "involve a gross deviation" from the standard of reasonable care.

Voisine, slip op. at 17-18, Appx. A. The question remains whether recklessly causing offensive physical contact and the common law offense of battery are one and the same.

All of the examples the First Circuit gives in interpreting reckless conduct involve causing bodily injury *See id.* at 19-20. It declined to address the issue which this Court squarely placed before it in remanding the case in light of *Castleman*. "The defendants focus their analysis on assaults involving reckless causation of offensive physical contact, rather than bodily injury. We do not see why that distinction is material to the analysis here." *Voisine*, slip op. at 22. Judge Torruella offered an answer to this distinction in his dissent:

> [T]he Maine statutes at issue here permit[] conviction for far less culpable conduct: merely reckless conduct that is also reckless as to the result of offensive physical contact. In so doing, the majority conflates *mens rea* as to the result with *mens rea* as to the underlying conduct that causes the result. It is this distinction that explains why common-law battery permits conviction for (1) intentional conduct that is reckless as to the result of bodily injury and (2) intentional conduct that is intentional as to the result of bodily injury or offensive touching, but does not permit conviction for (3) reckless conduct that is merely reckless as to the result of an offensive touching.

Voisine, slip op. at 34, n.9 (Torruella, J., dissenting)(alterations added).

These distinctions are both relevant and determinative because they are the ones explicitly adopted by this Court when limiting the conduct encompassed in the term "use ... of physical force" to the conduct constituting a common law battery. Given the Court's holding that intentional conduct is required for a common law battery to occur, it would appear appropriate for this Court to grant review to clarify that both elements of a battery offense, the intentional *mens rea* and the *actus reus* of physical contact, must appear as elements in a § 922(g)(9) predicate.

B. The interpretation of the phrase "use ... of physical force" adopted by the First Circuit conflicts with that of ten other circuits

The second reason the Court should grant review of the statutory construction issue is due to the split in the circuits regarding whether reckless conduct can fit within the term "use of force." The First Circuit's decision also conflicts with this Court's rationale for including non-violent conduct within the term "crime of domestic violence." The question regarding whether reckless conduct is sufficient, in the abstract, to satisfy the "use of force" element derives from the observation in *Castleman* that "It does not appear that every type of assault defined by § 39–13–101 necessarily involves 'the use or attempted use of physical force, or the threatened use of a deadly weapon,' § 921(a)(33)(A). A threat under § 39–13–101(2) may not necessarily involve a deadly weapon, and the merely reckless causation of bodily injury under § 39–13–101(1) may not be a 'use' of force." *Id.*, 134

S.Ct., at 1413-1414. This Court noted the split in the circuits regarding whether recklessly causing bodily injury (as opposed to recklessly causing offensive physical contact) has been ruled *not* to constitute "use ... of physical force" by ten circuits, whereas the issue had not been determined in the First Circuit.[8] *See id.*, n.8.

The First Circuit panel majority focused on the split noted in footnote 8, and reckless conduct as defined in Maine. It sought to limit this decision by noting that it was not determining whether all definitions of recklessness would fall within § 922(g)(9), but "only that the Maine definition is sufficiently volitional that it falls within the definition of 'use of physical force' applied in § 922(g)(9)." *Voisine*, slip op. at 24, Appx. A.

The holding is not a narrow one, as "the Maine definition is in fact a textbook definition of recklessness, falling squarely within the standard definitions of recklessness in various jurisdictions and as defined by multiple authorities. Indeed, the Maine definition is materially indistinguishable from the definition of recklessness in the Model Penal Code." *Voisine*, slip op. at 64 (Torruella, J., dissenting). It is the panel majority's reliance on conduct being volitional, but not purposeful, which creates the tension between it and this Court's rationale in *Castleman*.

In *Castleman*, the Court noted that "the knowing or intentional application of force is a 'use' of force. Castleman is correct that under *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004), the word 'use' 'conveys the idea that the

---

[8]The First Circuit joined all other circuits in determining that reckless conduct does not constitute a "crime of violence" for purposes of 18 U.S.C. § 16 in *United States v. Fish*, 758 F.3d 1 (1st Cir. 2014), but declined to follow *Fish* for purposes of § 921(a)(33)(A). *Fish* involved construing whether a variety of offenses qualified as "crimes of violence" for purposes of the possession of body armor. *See* 18 U.S.C.§ 931. It determined that offenses committed recklessly did not qualify as necessary predicates. *See Fish*, 758 F.3d at 9-10.

thing used (here, 'physical force') has been made the user's instrument.'" *Id.*, 134 S.Ct., at 1415. Even though "[m]inor uses of force may not constitute 'violence' in the generic sense ... an act of this nature is easy to describe as 'domestic violence,' when the accumulation of such acts over time can subject one intimate partner to the other's control." *Id.*, at 1412 (alteration added). The idea of "control" underlies the Court's adoption of non-violent contact as qualifying as "domestic violence." The same idea of "control" led other circuits to exclude crimes with the *mens rea* of recklessness from the term "use of force."

For instance, in *Jobson v. Ashcroft*, 326 F.3d 367 (2nd Cir. 2003), the Court considered whether a prior conviction for manslaughter in the second degree, which contained a *mens rea* of reckless conduct, *see id.*, at 372, could be a crime of violence under 18 U.S.C. § 16(b). The definition of recklessness at issue in *Jobson* is virtually identical to Maine's definition. *See id.* In determining that a defendant who is "aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists," *id.*, at 372 n.4, does not meet the definition of the federal statute, the Second Circuit reasoned that the "risk of serious physical injury concerns the likely effect of the defendant's conduct, but the risk in section 16(b) concerns the defendant's likely use of violent force as a means to an end." *Id.*, at 373.

The Fourth Circuit adopted the "as a means to an end" analysis in *Garcia v. Gonzales*, 445 F.3d 465 (4th Cir. 2006). There, the Court considered whether a conviction for reckless assault in the second degree, *see* N.Y. Penal Law § 120.05(4), constituted an aggravated felony for purposes of 8 U.S.C. § 1101(a)(43)(F), which requires a crime meet the definition of 18 U.S.C. § 16. In concluding that the prior conviction did not qualify, the Fourth Circuit emphasized that it is not sufficient that physical force occur, but that any such force must be used "as a means to an

end." *Id.*, 445 F.3d, at 469. Although both *Jobson* and *Garcia* involved § 16(b), the Court in *United States v. Portela*, 469 F.3d 496, 499 n.1 (6th Cir. 2006) noted that *Leocal* held both parts of § 16 to encompass the same *mens rea*. *See also Oyebanji v. Gonzales*, 418 F.3d 260, 263 (3rd Cir. 2005).

Not all courts have adopted the "means to an end" test. Some simply look at the level of *mens rea* and have decided that reckless conduct does not involve the level of intent implicated by the phrase "use of force." For instance, the Third Circuit reasoned that because "Oyebanji's crime, although plainly regarded by New Jersey as involving a substantial degree of moral culpability, did not involve the intentional use of force but instead required only recklessness," the Court held that a crime committed recklessly does not qualify as a "crime of violence." *Id.*, 418 F.3d, at 264. The definition of reckless conduct mirrors that adopted in Maine. *See id.*, at 263, n.4.

The Ninth Circuit, in *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006)(en banc) decided that a recklessly committed domestic violence assault did not qualify as a § 16 crime of violence. The definition of recklessness is similar to that in Maine. *See id.*, at 1130. The Court rejected "volitional" as the test for "use of force," but indicated that the dictionary definition of "accidental" (that level of intent specifically rejected in *Leocal*) indicates non-purposeful conduct. Reckless conduct is generally defined as non-purposeful as to result, and therefore fits the definition of "accidental." *See id.*, at 1129-1130. *See also United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001); *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008)(most reckless crimes are non-purposeful); *United States v. Torres-Villalobos*, 487 F.3d 607, 615 (8th Cir. 2007)(reckless manslaughter not a crime of violence after *Leocal*); *United States v. Zuñiga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008)(reckless conduct is the equivalent of accidental conduct and fails to

satisfy either prong of § 16); *United States v. Palomino-Garcia*, 606 F.3d 1317, 1335-1336 (11th Cir. 2010).

Given the rationale provided in *Castleman* that a non-violent offense may be used to exert control over a domestic partner, it would seem natural that "control" involves intentional, rather than reckless, conduct. It is difficult to say that a person recklessly exerts control over another, but more natural to say one intentionally does so. Although this Court has indicated that it wishes to have § 922(g)(9) apply as broadly as possible, the statute must have limits. The question, as noted in *Castleman*, involves a split in the circuits that will affect the application of § 922(g)(9) nationally Hence, this is a question ripe for review.

CONCLUSION

The instant petition presents important and far-reaching statutory and constitutional issues. These issues have long split the Courts of Appeals and have created conflict within the decisions of this Court. Both Petitioners have federal felony convictions that could not be upheld if the level of intent required for a common-law offensive contact infraction applied to their convictions. Neither could they be sustained if they had been afforded constitutionally mandated procedural and substantive protections. For the foregoing reasons, Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Dated: June 4, 2015

VIRGINIA G. VILLA
2689 230th Avenue
St. Croix Falls, WI 54024
villa_virginia@hotmail.com
Attorney for Petitioners
Counsel of Record

Index to Appendices

Appendix A: *United States v. Voisine and Armstrong*, First Cir. Nos. 12-1213 and 12-1216 (Jan. 30, 2015) decision of the First Circuit and Errata

Appendix B: *United States v. Voisine and Armstrong*, First Cir. Nos. 12-1213 and 12-1216, denial of rehearing and rehearing en banc

Appendix C: Ltr from FBI to Stephen Smith, Esq. dated August 13, 2013

APPENDIX A

United States Court of Appeals
For the First Circuit

Nos 12-1213
12-1216

UNITED STATES OF AMERICA,

Appellee,

v

STEPHEN L. VOISINE; WILLIAM E. ARMSTRONG III,

Defendants, Appellants

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MAINE

[Hon John A. Woodcock, U.S. District Judge]

Before

Lynch, Chief Judge,
Torruella and Stahl, Circuit Judges.

Virginia G. Villa, Assistant Federal Defender, Federal Defender Office, for appellants

Renée M. Bunker, Assistant United States Attorney, with whom Thomas E. Delahanty II, United States Attorney, was on brief, for appellee

---

January 30, 2015

LYNCH, **Chief Judge**. The Supreme Court has directed us, in light of United States v Castleman, 134 S Ct 1405 (2014), to consider again our decision in these two cases that both defendants had indeed been convicted under state law of "misdemeanor crimes of domestic violence," as defined in 18 U S.C § 921(a)(33)(A), even though the state statutes allowed conviction based on a recklessness mens rea Armstrong v United States, 134 S Ct 1759 (2014) (Mem.); see United States v Armstrong, 706 F 3d 1 (1st Cir 2013); United States v Voisine, 495 F App'x 101 (1st Cir 2013) (per curiam) If so, then their motions to dismiss their federal charges for possessing firearms after such convictions, in violation of 18 U S.C § 922(g)(9), were properly denied

Our answer is informed by congressional recognition in § 922(g)(9) of the special risks posed by firearm possession by domestic abusers "Domestic violence often escalates in severity over time and the presence of a firearm increases the likelihood that it will escalate to homicide " Castleman, 134 S Ct at 1408 It is also informed by the congressional choice in the federal sentencing scheme to honor each state's choice as to how to define its own crimes, through statutory text and judicial decision

As we see it, this case turns on the unique nature of § 922(g)(9) That section is meant to ensure that individuals who engage in the "seemingly minor act[s]" that actually constitute

domestic violence, like squeezing and shoving, may not possess a firearm. Castleman, 134 S. Ct at 1412 This range of predicate acts is broader than that found in other federal prohibitions involving the use of physical force Applying the teachings of Castleman, we find that Maine's definition of reckless assault fits within § 922(g)(9)

We affirm the denial of the motion to dismiss the indictment and information here That means the conditional guilty pleas the defendants entered are valid and their sentences stand. The question is close and we rule narrowly

I

A. Statutory Background

As the Supreme Court observed in Castleman, 18 U S.C § 922(g)(9) was enacted to close a loophole "While felons had long been barred from possessing guns, many perpetrators of domestic violence are convicted only of misdemeanors " Castleman, 134 S Ct at 1409 No ban prevented those domestic abusers from possessing firearms, yet there is a "sobering" connection between domestic violence and homicide Id. The "manifest purpose" of § 922(g)(9), the Lautenberg Amendment to the Gun Control Act of 1968, was to remedy the "potentially deadly combination" of "[f]irearms and domestic strife " United States v Hayes, 555 U S 415, 426-27 (2009)

Under § 922(g)(9), it is against federal law for any person "who has been convicted in any court of a misdemeanor crime of domestic violence" to "possess in or affecting commerce[] any firearm or ammunition " In turn, a "misdemeanor crime of domestic violence" is defined in § 921(a)(33)(A) as an offense that (1) is a misdemeanor under federal, state, or tribal law, and (2) "has, as an element, the use or attempted use of physical force committed by a current or former spouse, parent, or guardian of the victim" or by a person in a similar domestic relationship with the victim.

The predicate offenses in these cases are convictions under Maine assault statutes Me Rev Stat Ann tit 17-A, §§ 207(1)(A), 207-A(1)(A) Under Maine law, a "person is guilty of assault if[t]he person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person " Id. § 207(1)(A) A violation of § 207 constitutes misdemeanor domestic violence assault if the "victim is a family or household member " Id. § 207-A(1)(A)

Maine law explains that "[a] person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result " Id. § 35(3)(A) The statute goes on to give more meat to the "conscious disregard" definition It refers to disregard of a risk, "when viewed in light of the nature and

purpose of the person's conduct and the circumstances known to that person," that "involve[s] a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation " Id. § 35(3)(C)

B. Facts

William E Armstrong III was convicted in 2002 and 2008 of assaulting his wife in violation of Maine's misdemeanor assault statutes, Me Rev Stat Ann tit 17-A §§ 207(1)(A), 207-A(1)(A) In May 2010, twenty-nine months after the last domestic assault conviction, the Maine State Police searched the Armstrong residence for drug paraphernalia and marijuana. They discovered six firearms and ammunition. The police notified the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), which executed a search That search uncovered only ammunition, but Armstrong later explained that he had arranged for a friend to remove the guns ATF agents observed the guns at the friend's home

Armstrong was arrested and federally charged with being a prohibited person in possession of a firearm, in violation of § 922(g)(9) The indictment listed Armstrong's 2008 domestic violence assault conviction as the predicate offense

Stephen L. Voisine was convicted in 2003 and 2005 of assaulting a woman with whom he was in a domestic relationship, in violation of Maine's assault statute In 2009, acting on an

anonymous tip, state and local law enforcement officials arrested Voisine on the federal misdemeanor charge of killing a bald eagle in violation of 16 U S.C. § 668(a) When conducting a background check, they discovered his 2003 misdemeanor simple assault As Voisine had turned a rifle over to the police during the investigation, the criminal information charged him with violating § 922(g)(9) as well as § 668(a)

C Procedural History

Both Armstrong and Voisine moved to dismiss, arguing that their indictment and information did not charge a federal offense and that § 922(g)(9) violated the Constitution The district court denied the motions, and both defendants entered guilty pleas conditioned on the right to appeal the district court's decision [1]

We consolidated Armstrong and Voisine's cases In a January 18, 2013 opinion, we affirmed the district court's decisions Armstrong, 706 F 3d at 1; see Voisine, 495 F App'x. at 102 (incorporating the reasoning from Armstrong as there were "no pertinent factual differences" distinguishing the two cases) The defendants had argued that a misdemeanor assault on the basis of

---

[1] In February 2012, Armstrong was sentenced to three years of probation and a fine and special assessment totaling $2,600 Also in February 2012, Voisine was sentenced to a year and a day imprisonment on the § 922(g)(9) charge with two years supervised release, concurrent with nine months imprisonment and one year supervised release on the § 668(a) charge, and $125 in special assessments

offensive physical contact, as opposed to one causing bodily injury, is not a "use of physical force," and, concordantly, not a "misdemeanor crime of domestic violence " Relying on United States v Booker, 644 F 3d 12 (1st Cir 2011), and United States v Nason, 269 F 3d 10 (1st Cir 2001), we held that § 922(g)(9) did not distinguish between violent and nonviolent convictions, and the statute included the offensive physical contact portion of the Maine statute within its definition of "physical force " Armstrong, 706 F 3d at 6; Voisine, 495 F App'x at 101-02

Second, the defendants argued that § 922(g)(9) violated the Second Amendment as applied to them This argument was foreclosed by Booker, which denied an identical argument framed as a facial challenge 644 F 3d at 22-26; see Armstrong, 706 F 3d at 7-8; Voisine, 495 F App'x at 101

The defendants petitioned for certiorari On March 31, 2014, the Supreme Court granted their petitions, vacated the judgments, and remanded "for further consideration in light of United States v Castleman." Armstrong v United States, 134 S Ct 1759 (2014) (Mem.) In Castleman, the Court had addressed the issue of whether the phrase "use of physical force" in § 921(a)(33)(A) required violence or could be satisfied by offensive touching That issue had been the source of a circuit split Castleman resolved the question in agreement with Nason, holding that "Congress incorporated the common-law meaning of

'force' -- namely, offensive touching -- in § 921(a)(33)(A)'s definition of a 'misdemeanor crime of domestic violence '" Castleman, 134 S Ct at 1410 The Supreme Court left open whether a conviction with the mens rea of recklessness could serve as a § 922(g)(9) predicate Id. at 1414 In footnote 8, the Court stated, "the Courts of Appeals have almost uniformly held that recklessness is not sufficient," and listed ten cases [2] Id. at 1414 n 8 It then added, "But see United States v Booker, 644 F 3d 12, 19-20 (C.A.1 2011) " Id. The footnote did not say Booker was wrong It gave no further definition of recklessness Nor did it account for the differences in the statutory sections being interpreted in the other cases cited.

This case comes to us following the Supreme Court's remand

II

In construing § 922(g)(9)'s applicability to a given case, we use the "categorical approach " Under that approach the

---

[2] United States v Palomino Garcia, 606 F 3d 1317, 1335-36 (11th Cir 2010); Jimenez-Gonzalez v Mukasey, 548 F 3d 557, 560 (7th Cir 2008); United States v Zuniga-Soto, 527 F 3d 1110, 1124 (10th Cir 2008); United States v Torres-Villalobos, 487 F 3d 607, 615-16 (8th Cir 2007); United States v Portela, 469 F 3d 496, 499 (6th Cir 2006); Fernandez-Ruiz v Gonzales, 466 F 3d 1121, 1127-32 (9th Cir 2006) (en banc); Garcia v Gonzales, 455 F 3d 465, 468-69 (4th Cir 2006); Oyebanji v Gonzales, 418 F 3d 260, 263-65 (3d Cir 2005) (Alito, J); Jobson v Ashcroft, 326 F 3d 367, 373 (2d Cir 2003); United States v Chapa-Garza, 243 F 3d 921, 926 (5th Cir 2001)

elements of the predicate offense (here, the Maine assault statute) must be identical to or categorically within the description of the subsequent provision (here, § 922(g)(9)) See Castleman, 134 S Ct at 1413 Where, as here, the predicate statute is "divisible" into crimes with alternative sets of elements, we may consider whether the elements under which the defendant was convicted are still within the subsequent provision, an inquiry known as the "modified categorical approach " Id. at 1414 The government concedes that the record here of the state proceedings is too sparse to "discern under which prong of Maine's statute" the defendants were convicted, and they urge us against "resort[ing] to the modified categorical approach." For us to affirm, we must find that the Maine statute -- including the reckless acts it prohibits -- categorically fits within § 922(g)(9)

The defendants frame the issue as whether a reckless act can constitute a "use of physical force" and rely on cases interpreting statutes other than § 922(g)(9) We do not agree that is the proper way to frame the question That framing is predicated on the notion that particular statutory language must be interpreted identically in different sections across the U S Code. To the contrary, context matters, as the Supreme Court demonstrated in Castleman itself 134 S Ct. at 1410-12 The question is whether Maine's definition of recklessness fits within § 921(a)(33)(A)'s phrase "use of physical force "

Section 921(a)(33)(A) is a provision crafted in the unique context of domestic violence, and it should be so interpreted. Castleman, 134 S Ct at 1410-12 & n 4; Booker, 644 F 3d at 18-21

This reframing of the question clarifies our approach to the two arguments raised by the defendants: that Castleman footnote 8 decides this case, and that Castleman's analysis of § 921(a)(33)(A) undermines our prior decisions Castleman's emphasis on context reinforces, rather than undermines, our earlier decision

A. Castleman Footnote 8

The defendants read too much into Castleman footnote 8, which expressly does not resolve the question before us Nor is their argument made by reference to the cases cited for contrast in

the footnote Each of those cases[3] construes a different statutory definition, and all but one arose in a different context

---

[3] All but one of the ten cases cited in Castleman footnote 8 as deciding the § 922(g)(9) mens rea issue in fact considered other statutes in other contexts and followed the reasoning of Leocal v Ashcroft, 543 U S 1, 13 (2004) Six cases analyzed 18 U S C § 16 In Oyebanji v Gonzales, 418 F 3d 260, 263-65 (3d Cir 2005) (Alito, J), the Third Circuit read Leocal to apply to § 16(b), which offered an alternative definition of "crime of violence" to § 16(a), and decided that reckless crimes cannot be crimes of violence under that section Three other cases from the footnote did the same See Garcia v Gonzales, 455 F 3d 465, 467-69 (4th Cir 2006) (interpreting § 16(b), as referenced in an immigration statute); Jimenez-Gonzalez v Mukasey, 548 F 3d 557, 559-62 (7th Cir 2008) (same); United States v Torres-Villalobos, 487 F 3d 607, 614-17 (8th Cir 2007) (same) Two more interpreted the same provision, but without relying on Leocal, which had yet to be decided. See Jobson v Ashcroft, 326 F 3d 367, 373-74 (2d Cir 2003); United States v Chapa-Garza, 243 F 3d 921, 926-27 (5th Cir 2001) All of these cases interpreted the term "crime of violence" as part of an aggravated felony statute, and Castleman is clear that the interpretive rules governing felonies do not apply to misdemeanor crimes of domestic violence. 134 S Ct at 1411

Three of the remaining four cases interpreted the term "use of physical force" in the context of a Sentencing Guidelines provision imposing an enhancement for defendants who were deported after committing a felony "crime of violence," U S Sentencing Guidelines Manual § 2L1 2(b)(1)(A) Each of those cases analyzed the provision by analogizing to § 16 and applying Leocal. For example, in United States v Palomino Garcia, the Eleventh Circuit explained that both § 16 and the Guidelines provision define the phrase "crime of violence," and they are "almost identically worded." 606 F 3d 1317, 1335 (11th Cir 2010) It then cited Leocal and the other § 16 cases mentioned above to conclude that a "use of physical force" cannot be reckless Id. at 1335-36; see also United States v Portela, 469 F 3d 496, 498-99 (6th Cir 2006); United States v Zuniga-Soto, 527 F 3d 1110, 1124 (10th Cir 2008)

Even if § 16 were analogous to § 922(g)(9), that would not resolve the matter The Third Circuit has explained that some reckless convictions can serve as predicates for § 16 offenses, depending on the nature of the recklessness Aguilar v Att'y Gen., 663 F 3d 692, 698-700 (3d Cir 2011); cf. United States v Espinoza, 733 F 3d 568, 572-74 (5th Cir 2013) (allowing a reckless conviction to be a predicate for a violent felony under the Armed Career Criminal Act)

Footnote 8 begins by describing the issue as an open question, with a citation to Leocal v Ashcroft, 543 U S 1, 13 (2004) In Leocal, the Supreme Court interpreted 18 U S C § 16(a), the definition of the term "crime of violence " 543 U.S at 8-10 Such a crime requires "use of physical force," and Leocal held that the term "use" suggests a mens rea higher than negligence, but it withheld judgment on whether recklessness is sufficient, Castleman, 134 S Ct at 1414 n 8; Booker, 644 F 3d at 19-20

Considering context, section 16(a) is not analogous to the section which concerns us, § 922(g)(9) Castleman itself distinguished the term "use of force" in § 16(a), a provision for undifferentiated violent crimes, from the term "use of physical force" in § 922(g)(9)'s domestic violence provision "Domestic violence" is a "term of art" that "encompasses a range of force broader than that which constitutes 'violence' simpliciter," including "acts that might not constitute 'violence' in a nondomestic context " Castleman, 134 S Ct at 1411 & n 4 A "crime of violence," by contrast, "suggests a category of violent, active crimes " Id. at 1411 n 4 (quoting Leocal, 559 U S at 140) (internal quotation mark omitted) As the Supreme Court explained, a "'squeeze of the arm [that] causes a bruise'" is "hard to describe as 'violence'" within the meaning of § 16, but "easy to describe as 'domestic violence'" within the meaning of

§ 922(g)(9) Id. at 1412 (alterations in original) (quoting Flores v Ashcroft, 350 F 3d 666, 670 (7th Cir 2003)) (internal quotation marks omitted)

Unsurprisingly, the drafting history of § 922(g)(9) indicates that "Congress expressly rejected" the § 16(a) definition, instead developing the term "misdemeanor crime of violence" that was "'probably broader' than the definition" in § 16 Booker, 644 F 3d at 19 (citing a statement by Sen Lautenberg) And where Congress wanted to define a domestic violence crime as a § 16 crime of violence occurring in the domestic context, it has done so -- even in the same legislation that contained the Lautenberg Amendment See, e.g., 8 U S C § 1227(a)(2)(E) "That it did not do so here suggests, if anything, that it did not mean to." Castleman, 134 S Ct at 1412 n 6

The only case cited in Castleman footnote 8 from the domestic violence context is one in which Congress elected to define the crime with reference to § 16 In Fernandez-Ruiz v Gonzales, the Ninth Circuit considered whether a reckless misdemeanor could serve as a predicate "crime of domestic violence " 466 F 3d 1121, 1124 (9th Cir 2006) (en banc) (citing 8 U S.C. § 1227(a)(2)(E)(i)) Unlike § 922(g)(9), however, the relevant statute in Fernandez-Ruiz defined "crime of domestic violence" as a "crime of violence" (referencing § 16) committed

against someone in a domestic relationship with the perpetrator Id. at 1124-25 The Ninth Circuit accordingly conducted a § 16 analysis, applying Leocal and cases from other circuits to reach its conclusion Id. at 1127-32 But even that result did not follow so obviously from Leocal, as four judges dissented emphasizing the differences between domestic violence and other contexts Id. at 1136 (Wardlaw, J , dissenting)

On remand of this case to us, the defendants' brief adds to the cases in the footnote by citing two other § 922(g)(9) cases, not mentioned in Castleman, which they say directly conflict with Booker We disagree In United States v White, 258 F 3d 374 (5th Cir 2001), the relevant predicate statute criminalized reckless "conduct that places another in imminent danger of serious bodily injury " Id. at 381 The court found that the statute did not require a completed "use of physical force," since it was satisfied by a risk of injury, and the statute extended beyond an "attempted use of force" because attempt liability requires specific intent rather than recklessness Id. at 382-84 Rather than construing the phrase "use of physical force," as Booker did, White relied on principles of attempt liability to rule out reckless predicate crimes

In United States v Howell, 531 F 3d 621 (8th Cir 2008), also added by the defendants, the predicate statute criminalized reckless "conduct which creates a grave risk of death or serious

physical injury to another ". Id. at 624 The court found this provision to be a "catch-all provision applicable to innumerable factual situations," so a completed "use of physical force" is not always or ordinarily present Id.

Simply put, we are aware of no case -- including the cases in Castleman footnote 8 -- in conflict with Booker's holding that a reckless misdemeanor assault satisfies § 922(g)(9)'s particular definition of a "misdemeanor crime of domestic violence " Rather, § 922(g)(9)'s unique context, as described in Castleman and supported by the legislative history, suggests that § 922(g)(9) should be interpreted more broadly than other provisions, including § 16.

B. Structure of Castleman

The defendants present a second argument, which is that Castleman's analytical approach to the term "use of physical force" means the conduct of neither defendant here could meet that standard. Castleman held that Congress intended to incorporate the common law meaning of "force" in § 921(a)(33)(A), the definitional provision for "misdemeanor crime of domestic violence " 134 S Ct at 1410 "[A]bsent other indication, 'Congress intends to incorporate the well-settled meaning of the common law terms it uses '" Id. (quoting Sekhar v United States, 133 S. Ct 2720, 2724 (2013)) (internal quotation mark omitted) As a result, the

statutory term "physical force" is satisfied by "the degree of force that supports a common-law battery conviction " Id. at 1413 The parties agree that, under Castleman, the term "use of physical force" also incorporates the common law mens rea for battery

The parties approach this as a generalized question They disagree about whether reckless acts could or could not constitute batteries at common law, and each side marshals support for its view See, e.g., Johnson v United States, 559 U S 133, 139 (2010); Lynch v Commonwealth, 109 S E 427, 428 (Va 1921); Commonwealth v Hawkins, 32 N.E. 862, 863 (Mass 1893); 2 Wayne R. LaFave, Substantive Criminal Law § 16 2(c)(2); 3 William Blackstone, Commentaries *120

We decline the parties' invitation to define the mens rea of a common law battery independent of the interpretation Maine gives its own statute Castleman explains that the term "use of physical force" includes "the type of conduct that supports a common-law battery conviction." 134 S Ct at 1411 Castleman also explains that Congress incorporated "the common-law meaning of 'force '" Id. at 1410 Castleman holds that the term "use of physical force" includes both causing bodily injury and offensive contact Defendants concede that reckless causation of bodily injury is a use of physical force We see no reasoned argument that offensive physical contact does not similarly entail the use

of force simply because it is inflicted recklessly as opposed to intentionally

We follow the statutory scheme in evaluating whether a conviction under the Maine statute categorically counts as a "misdemeanor crime of domestic violence "

1 The Scope of a "Misdemeanor Crime of Domestic Violence"

As Castleman explained, § 922(g)(9) is a statute with a particular purpose: to ensure that domestic abusers convicted of misdemeanors, in addition to felonies, are barred from possessing firearms 134 S Ct at 1408-12 "[B]ecause perpetrators of domestic violence are 'routinely prosecuted under generally applicable assault or battery laws,'" id. at 1411 (quoting Hayes, 555 U S at 427), we think Congress intended the firearm prohibition to apply to those convicted under typical misdemeanor assault or battery statutes See id. at 1411, 1413 That encompasses assault statutes for those states that allow conviction with a mens rea of recklessness where recklessness is defined as including a degree of intentionality A victim of domestic violence often encounters the perpetrator again, and a broader reading of § 922(g)(9)'s mens rea requirement better ensures that a perpetrator convicted of domestic assault is unable to use a gun in a subsequent domestic assault If Congress had wanted to impose a higher mens rea, it could have done so explicitly, as it did in the immediately preceding section of the bill that established § 922(g)(9) Booker, 644 F 3d at 18 & n 5

This view is confirmed by the legislative history of § 922(g)(9) Senator Lautenberg explained that § 922(g)(9) was a broad prohibition covering "any person convicted of domestic violence," without reference to a particular mental state 142 Cong Rec S10377-01 (1996) Another senator made statements to the same effect See id. Additionally, Senator Lautenberg described the law's application to scenarios without clear intent, in which domestic arguments "get out of control," "the anger will get physical," and one partner will commit assault "almost without knowing what he is doing " 142 Cong Rec S11872-01 (Sept 30, 1996) Such conduct may not be "knowing," but it nonetheless constitutes a "use" of physical force -- whether it causes offensive contact or bodily harm.

2 Maine's Definition of "Recklessness"

Whatever the common law meaning of battery as to recklessness, Maine characterizes recklessness as a mens rea involving a substantial amount of deliberateness and intent The statutory definition requires that a person "consciously disregard[] a risk that the person's conduct will cause" the result Me Rev Stat Ann. tit 17-A § 35(3)(A) (emphasis added) The disregard of the risk is "viewed in light of the nature and purpose of the person's conduct and the circumstances known to the person " Id. § 35(3)(C) (emphasis added) Further, it must

"involve a gross deviation" from the standard of reasonable care Id.

Maine's definition of "recklessly," like its definition of "knowingly," includes an element of intentionality and specificity To act "knowingly" in Maine, the person must be aware that the result is "practically certain" to occur Id. § 35(2)(a) Maine's definitions of knowingly as contrasted with recklessly differ primarily in their description of the degree of the person's awareness of the likelihood that the result will occur Cf. 2 LaFave, Substantive Criminal Law, § 5 4(f) To act knowingly and recklessly, but not negligently, the person must be aware of the risk: the recklessness definition requires reference to "the nature and purpose of the person's conduct and the circumstances known to the person " Maine's Supreme Judicial Court has made clear that the recklessness inquiry focuses on the person's "subjective state of mind." Stein v Me. Criminal Justice Acad., 95 A.3d 612, 618 (Me 2014) (quoting State v Goodall, 407 A.2d 268, 280 (Me 1979)) (internal quotation mark omitted); see State v Hicks, 495 A.2d 765, 771 (Me 1985) (comparing the subjective test for recklessness with the objective test for negligence)

For example, the Maine Supreme Judicial Court has affirmed a conviction for "act[ing] recklessly when [the defendant] shot a powerful handgun into the woods in a residential area and in the direction of his next-door neighbor's home, knowing where it

was located " State v Kline, 66 A 3d 581, 584 (Me 2013) (citing Me Rev Stat Ann. tit 17-A § 35) It also affirmed a conviction for reckless conduct with the use of a dangerous weapon when the defendant "drove his van alongside the victim's vehicle, remaining there [,] used his van to push the victim's vehicle into heavy oncoming traffic, and made contact with that vehicle at least once " State v York, 899 A.2d 780, 783 (Me. 2006)

Maine's definition of recklessness includes a volitional component In this, it is like other states See Fernandez-Ruiz, 466 F 3d at 1141 (Wardlaw, J , dissenting) (collecting cases) Notwithstanding Leocal, some judges found that even § 16 encompassed reckless predicate convictions In Fernandez-Ruiz, four dissenting judges of the Ninth Circuit observed that Arizona's definition of recklessness, like Maine's, requires that the person "be aware of a substantial and unjustifiable risk and affirmatively choose to act notwithstanding that risk." Id. Recklessness includes an "volitional, active decision, which necessarily involves 'a higher degree of intent than negligent or merely accidental conduct '" Id. (quoting Leocal, 543 U S at 9); accord Bejarano-Urrutia v Gonzales, 413 F 3d 444, 449-50 (4th Cir 2005) (Niemeyer, J , dissenting) ("Unlike a person who accidentally injures another person, a person who acts recklessly in bringing about harm to another is aware of the nature of his conduct and thus can be said to be 'actively employ[ing]' the physical force

that results in injury 'against another '" (alteration in original) (quoting Leocal, 543 U S at 9))

3 Categorical Comparison

We conclude that reckless assault in Maine is "use of physical force" within the meaning of a "misdemeanor crime of domestic violence " As noted above, § 922(g)(9) is meant to embrace those seemingly minor predicate acts, occurring sometimes in moments of passion, where the perpetrator consciously disregarded a risk in light of known circumstances This often constitutes domestic violence Reckless assaults in Maine fit that congressional intent for § 922(g)(9), including the paradigm of a domestic assault as described by Senator Lautenberg As the dissenting judges on the Ninth Circuit, concerned with a different federal statute, explained:

> "Domestic abusers may be drunk or otherwise incapacitated when they commit their crimes, and they may plea bargain down from a felony to a misdemeanor or from a statute that requires a mens rea of intentionality to one that can be satisfied by recklessness But this does not alter the nature of domestic violence as a crime involving the use of force against someone in a domestic relationship "

Fernandez-Ruiz, 466 F 3d at 1139 (Wardlaw, J , dissenting)

Defendants' position assumes that a reckless act cannot be an act of domestic violence because it lacks volition But that is not true For example, suppose Maine convicts a husband for throwing a knife toward his wife, intending to instill fear rather

than to cause physical injury, but actually striking her The mens rea of the conviction would likely be recklessness: in light of the circumstances known to the husband, he consciously disregarded the risk of harm. Such a reckless assault can "subject one intimate partner to the other's control," Castleman, 134 S Ct at 1411, and is the type of conduct included in § 922(g)(9) even though the husband did not intend to cause bodily injury or offensive contact. Similarly, if Maine prosecutes and convicts a parent for assault for waving a lit cigarette near a child in anger, the cigarette touching and burning the child, that conviction in context may well be an act of domestic violence

The defendants focus their analysis on assaults involving reckless causation of offensive physical contact, rather than bodily injury We do not see why that distinction is material to the analysis here The issue is whether § 922(g)(9) encompasses reckless uses of force, regardless of whether the use of force results in bodily injury or an offensive physical contact If the husband's knife grazes his wife or harms her grievously, it is an assault all the same [4]

---

[4] The dissent wrongly relies on our decision in United States v Bayes, 210 F 3d 64 (1st Cir 2000), for the proposition the federal assault statute requires deliberate action Id. at 69 (citing 18 U S.C. § 113(a)(5)) Bayes says that "it is sufficient to show the defendant deliberately touched another in a patently offensive manner without justification or excuse " Id. In deciding that the statue did not require specific intent, Bayes did not pass on whether recklessness would satisfy the statute Further, the dissent relies on the rule of lenity, an argument not

As a practical matter, it is hard to identify a case of reckless assault in the domestic context that Maine would prosecute but that Congress did not intend to serve as a § 922(g)(9) predicate See James v United States, 550 U S. 192, 208 (2007) (explaining that the categorical approach focuses on "the ordinary case," not "every conceivable factual offense covered by a statute"); United States v Fish, 758 F 3d 1, 6 (1st Cir 2014) ("[I]n assessing whether the elements of the candidate proposed as a predicate crime are overbroad, we need not consider fanciful, hypothetical scenarios ") Maine will not prosecute all "[m]inor uses of force " Castleman, 134 S Ct at 1412; see Flores v Ashcroft, 350 F 3d 666, 672 (7th Cir 2003) (Evans, J , concurring) ("[P]eople don't get charged criminally for expending a newton of force against victims [The defendant] actually beat his wife ") But some grabbing and slapping "accumulat[es] over time," "subject[ing] one intimate partner to the other's control " Castleman, 134 S Ct at 1412 When it eventually "draws the attention of authorities and leads to a successful prosecution for a misdemeanor offense, it does not offend common sense or the English language to characterize the resulting conviction as a 'misdemeanor crime of domestic violence '" Id. After all, not all assaults will serve as

---

made by the defendants

§ 922(g)(9) predicates, but only those occurring in the domestic context

To be clear, we do not decide that, on the spectrum from negligence to intentional acts, recklessness is always closer to the latter Cf. Fernandez-Ruiz, 466 F 3d at 1141-42 (Wardlaw, J , dissenting) ("Recklessness is a distinct mens rea, which lies closer to intentionality than to negligence ") We also do not decide that recklessness in the abstract is always enough to satisfy § 922(g)(9) [5] We decide only that the Maine definition is sufficiently volitional that it falls within the definition of "use of physical force" applied in § 922(g)(9) See Booker, 644 F 3d at 18

C. Our Recent Decision in Carter Does Not Help the Defendants

In United States v Carter, 752 F 3d 8 (1st Cir 2014), we encountered similar facts to this case We remanded for the district court to determine whether the defendant had indeed been convicted of a reckless assault The opinion noted that Castleman "casts doubt" upon Booker, but it explicitly did "not decide" the

---

[5] As recognized at 2 LaFave, Substantive Criminal Law, § 5 4 n.6, "usage of the term [recklessness] has not been consistent " See, e.g., United States v Meeks, 664 F 3d 1067, 1070-71 & n.2 (6th Cir 2012) (explaining that "recklessness" in Kentucky is a lower standard than "being aware of and consciously disregarding a substantial and unjustifiable risk") As the dissent observes, while the Model Penal Code definition is similar to Maine's (though not identical), Puerto Rico's definition--until the new statute is in effect--has language quite different from the Maine statute

question before this court Id. at 18 & n 11 Now, squarely presented with the issue and having reviewed Castleman, we resolve the question left open by Carter

III

The defendants make three constitutional arguments, none of which are successful

First, the defendants renew their prior argument that § 922(g)(9) violates the Second Amendment as applied to them. They explicitly raise the argument only to preserve it, and for good reason: it is "foreclosed by binding precedent in this circuit " Carter, 752 F 3d at 13; see Armstrong, 706 F 3d at 7-8; Booker, 644 F 3d at 22-26

Second, the defendants offer a "gloss" on their earlier argument They suggest that Castleman held that the link between non-violent misdemeanors and domestic violence involving firearms is extremely tenuous, and they argue that such a tenuous link cannot support the law's constitutionality To the contrary, Castleman explained that the link between non-violent misdemeanors and domestic violence involving firearms is "sobering," and hardly tenuous 134 S Ct at 1409.

The defendants also raise an argument outside the scope of the Supreme Court's remand. They claim that § 922(g)(9) violates the Fifth Amendment, Sixth Amendment, and Ex Post Facto

Clause because the determination that the predicate crime involves domestic violence is made at the time of the § 922(g)(9) conviction, rather than at the time of the predicate conviction

We have discretion to reexamine issues beyond the scope of the Supreme Court's specific remand order when "necessary to avoid extreme injustice " United States v Burnette, 423 F 3d 22, 25 n 6 (1st Cir 2005) (quoting United States v Estevez, 419 F 3d 77, 82 (1st Cir 2005)) (internal quotation mark omitted) But "[t]here is no injustice in refusing to reexamine a carefully considered decision based on the same arguments that we have already rejected." Id. at 25 n 6 The Supreme Court has already rejected arguments very similar to the defendants' in United States v Hayes, 555 U S 415, 421 (2009)

The defendants argue that Hayes was implicitly overruled by a recent Supreme Court decision, Descamps v United States, 133 S Ct 2276 (2013) Hayes held that the determination that an earlier conviction involved a domestic relationship is an element of § 922(g)(9), not the predicate conviction 555 U S at 418 Descamps limited the extent to which courts can look at the facts underlying the predicate conviction to determine whether they fit the subsequent conviction, under the modified categorical approach 133 S Ct at 2281-82 The defendants argue that, as in Descamps, the subsequent court may not evaluate the predicate conviction to

determine a fact about it -- here, whether it involved a domestic relationship

We reject this argument Whether the predicate conviction involved a domestic relationship is not a fact about the predicate conviction discerned through application of the modified categorical approach, in violation of Descamps It is an element proved anew in the § 922(g)(9) proceeding

IV

The question before us is a narrow one We are asked to decide whether a conviction for reckless assault against a person in a domestic relationship in Maine constitutes a federal "misdemeanor crime of domestic violence " Congress in passing the Lautenberg Amendment recognized that guns and domestic violence are a lethal combination, and singled out firearm possession by those convicted of domestic violence offenses from firearm possession in other contexts Castleman recognizes as much

For the reasons stated above, we affirm the judgments of guilt

So ordered.

-Dissenting Opinion Follows-

TORRUELLA, Circuit Judge, Dissenting The majority fails to adequately justify its departure from the Supreme Court's direction and the analogous decisions of our sister circuits Indeed, the Supreme Court's message is clear In United States v Castleman, 134 S Ct 1405 (2014), the Court noted that we are the only outlying circuit on this question: our prior precedent is inconsistent with every other circuit court to consider the issue See id. at 1414 n 8 (contrasting our past position with that of the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuit Courts of Appeals, which have "uniformly held that recklessness is not sufficient" to "constitute a 'use' of force") The Court then remanded the instant cases for reconsideration in light of Castleman, see United States v Armstrong, 134 S Ct 1759 (2014), implicitly suggesting that we bring our holdings in line with the other federal circuit courts of appeals We are obligated to heed the Supreme Court's direction See McCoy v Mass. Inst. of Tech., 950 F 2d 13, 19 (1st Cir 1991) ("[F]ederal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement ") Not only are the Supreme Court's instructions mandatory, but the legal reasoning and analysis in the cases cited by the Court are also correct

On remand, this case requires us to answer, at the very least, one question of statutory interpretation: whether a Maine conviction for the "reckless" causation of an "offensive physical contact" necessarily involves the "use or attempted use of physical force" as required to establish a "misdemeanor crime of domestic violence" for purposes of 18 U.S.C. § 922(g)(9). The majority fails to persuasively explain why, in all cases, the merely reckless causation of offensive physical contact categorically must involve the "use or attempted use of physical force," 18 U.S.C. § 921(a)(33)(A), particularly in light of the host of cases strongly suggesting otherwise. As explained herein, these cases hold that the "use" of physical force requires the active or intentional employment of force, which cannot be satisfied by merely reckless conduct.

Confronting this question, we are not acting upon an empty stage; rather, we must start with the backdrop painted by the Supreme Court in Castleman, which is the basis for the instant remand. Indeed, the Castleman Court questioned whether the "merely reckless causation" of even bodily injury -- much less offensive physical contact -- could constitute the "use" of force, noting that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient," because the "use" of force requires a greater degree of intentionality. Castleman, 134 S. Ct. at 1414 & n.8.

Although the majority opinion correctly observes that those circuit court cases involved different statutes, the operative language is nearly identical and the majority fails to persuasively explain why the result should be different here All of the analogous cases involved the "use" of "force," and most interpreted 18 U S C § 16 See id. at 1414 n 8 (listing cases) Several of these cases[6] analyzed § 16(a), which defines a "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another " 18 U S.C § 16(a) That language is materially indistinguishable, as relevant here, from the Lautenberg Amendment's definition of a "misdemeanor crime of domestic violence" as an offense that "has, as an element, the use or attempted use of physical force " 18 U S.C § 922(g)(9); id. § 921(a)(33)(A) "[W]hen Congress uses the same language in two statutes having similar purposes, it is appropriate to presume that Congress intended that text to have the same meaning

---

[6] See United States v Torres-Villalobos, 487 F 3d 607, 616-17 (8th Cir 2007) (holding that Minnesota second-degree manslaughter can be committed recklessly without the intentional use of force, and therefore is not a crime of violence under § 16(a)); Fernández-Ruiz v Gonzales, 466 F 3d 1121, 1123 (9th Cir 2006) (holding that reckless conduct cannot constitute the "use" of force for purposes of § 16(a)); García v Gonzales, 455 F 3d 465, 468 (4th Cir 2006) (reasoning that the "use" of "physical force" requires the intentional employment of physical force, and therefore holding that a New York second-degree reckless assault conviction is "beyond the scope" of § 16(a))

in both statutes " Smith v City of Jackson, Miss., 544 U S 228, 233 (2005) [7]

The majority opinion concedes that this case presents a "close" question Ante, at 3 I agree Given the Supreme Court and circuit court cases interpreting similar statutes and holding that merely reckless conduct is insufficient to constitute the "use" of physical force, I believe that the rule of lenity also forecloses the defendants' convictions here Indeed, it is a "familiar principle" that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'" towards the accused. Skilling v United States, 561 U S 358, 410 (2010)

---

[7] Moreover, the cases involving § 16(b) provide even stronger support for the defendants' position here, as § 16(b) involves language more susceptible than that of § 16(a) or the Lautenberg Amendment to a reading that encompasses reckless conduct Compare 18 U S.C § 16(b) (defining a "crime of violence" as a felony that "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"), with Model Penal Code § 2 02(2)(c) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct ") Yet most courts nonetheless have rejected arguments that § 16(b) can be satisfied by a predicate offense with a mens rea of recklessness See, e.g., Jobson v Ashcroft, 326 F 3d 367, 373 (2d Cir 2003) ("[T]he verb 'use' in section 16(b), particularly when modified by the phrase 'in the course of committing the offense,' suggests that section 16(b) 'contemplates only intentional conduct and refers only to those offenses in which there is a substantial likelihood that the perpetrator will intentionally employ physical force '" (internal quotation marks omitted) (quoting Dalton v Ashcroft, 257 F 3d 200, 208 (2d Cir 2001)))

(quoting Cleveland v United States, 531 U S 12, 25 (2000)) [8] The rule of lenity bars courts from giving the text of a criminal statute "a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant " Burrage v United States, 134 S Ct 881, 891 (2014) In my view, by permitting a conviction based on the reckless causation of offensive physical contact, the government and the majority seek to give the "use of physical force" a meaning different from that phrase's ordinary meaning The ordinary meaning of the "use" of physical force requires the intentional employment of force, and not the merely accidental, negligent, or reckless use of such force Cf. Leocal v Ashcroft, 543 U.S 1, 4 (2004) (giving an ordinary and natural reading to the phrase "'use of physical force against the person or property of another,'" and holding that this phrase requires "a higher degree of intent than negligent or merely accidental conduct" (quoting 18 U S C § 16(a))); id. (explaining that "'use' requires active employment," and reasoning that "a person would 'use physical force against' another when

[8] In addition to its acknowledgment that this is a "close" case, the majority's reliance on legislative history also suggests that the statutory text is ambiguous Cf. Tenn. Valley Auth. v Hill, 437 U S 153, 184 n.29 (1978) ("When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning ") Furthermore, the contrasting results reached by the First Circuit and our sister circuits on the interpretation of the phrase "use of physical force" provide additional evidence of that statutory text's ambiguity

pushing him [but not] by stumbling and falling into him"); Garcia v Gonzales, 455 F 3d 465, 468 (4th Cir 2006) (holding that "the use of physical force" requires the intentional employment of physical force) Moreover, given that the Supreme Court has stated that (1) "the merely reckless causation of bodily injury may not be a 'use' of force," and (2) "the Courts of Appeals have almost uniformly held that recklessness is not sufficient" to constitute the "use" of force, Castleman, 134 S Ct at 1414 & n 8, I cannot see how the proper application of the rule of lenity permits affirmance of the defendants' convictions

I express no opinion here on whether the "use" of physical force is satisfied by either the reckless causation of bodily injury or the intentional or knowing causation of offensive physical contact Rather, I confine my inquiry to one subsumed offense under the Maine assault statutes: the reckless causation of offensive physical contact Although the majority states that they fail to see why the distinction between "bodily injury" and "offensive physical contact" "is material to the analysis here," ante, at 22, I explain herein why that distinction matters See infra Section II(B)(1) Namely, even if recklessness were a sufficient mens rea for purposes of bodily injury, a conviction

under the Lautenberg Amendment nonetheless cannot rest on the reckless causation of offensive physical conduct in Maine [9]

The Supreme Court has stated that, under the Lautenberg Amendment, Congress classified as a "'misdemeanor crime of domestic violence'" "the type of conduct that supports a common-law battery conviction " Castleman, 134 S. Ct at 1411 The Supreme Court has further explained that "the common-law crime of battery consisted of the intentional application of unlawful force against the person of another " Johnson v United States, 559 U S 133, 139 (2010) (emphasis added); see also United States v Bayes, 210 F 3d 64, 69 (1st Cir 2000) ("[T]he common law provided that an assault committed by way of a battery did not require an intent to cause or to threaten an injury as long as the defendant touched

---

[9] All of the examples cited by the majority -- squeezing, shoving, a squeeze of the arm that causes a bruise, shooting a powerful handgun in the direction of a neighbor's home, driving a van to make contact with another vehicle and to push the victim's vehicle into heavy oncoming traffic, a husband throwing a knife towards his wife intending to instill fear but actually striking her, and waving a lit cigarette near a child in anger so that the cigarette touches and burns the child, ante, at 3, 12, 19-20, 21-22 -- involve intentional conduct that is reckless as to the result, which in nearly all of those examples is bodily injury By contrast, the Maine statutes at issue here permits conviction for far less culpable conduct: merely reckless conduct that is also reckless as to the result of offensive physical contact In so doing, the majority conflates mens rea as to the result with mens rea as to the underlying conduct that causes the result It is this distinction that explains why common-law battery permits conviction for (1) intentional conduct that is reckless as to the result of bodily injury and (2) intentional conduct that is intentional as to the result of bodily injury or offensive touching, but does not permit conviction for (3) reckless conduct that is merely reckless as to the result of an offensive touching

another in a deliberately offensive manner without a valid reason to do so.") (emphasis added); State v Rembert, 658 A.2d 656, 658 (Me 1995) (stating that "[u]npermitted and intentional contacts [are] actionable as an offensive contact") (emphasis added); cf. Wayne R. LaFave, 2 Substantive Criminal Law § 16 2(c)(2) n 32 (2d ed.) ("[W]ith the tort of battery an intention to injure or touch offensively is needed"); Black's Law Dictionary 182 (10th ed. 2014) (defining tortious battery as a "nonconsensual, intentional, and offensive touching of another without lawful justification") (emphasis added) To trigger a violation of the Lautenberg Amendment, therefore, the relevant precedent counsels that the offensive touch must be caused intentionally and not merely recklessly By contrast, the Maine statutes at issue here permit conviction for recklessly causing an offensive touch.[10] Therefore, a conviction under either of the Maine assault statutes implicated here does not categorically establish a violation of the Lautenberg Amendment Given that the record does not permit a conclusion that the defendants' Maine convictions rested on a subsumed offense that

---

[10] To recklessly cause an offensive physical contact in Maine, a person must consciously disregard a risk that his or her conduct will cause physical contact -- something more than a mere touching -- that a reasonable person would find to be offensive under the circumstances See Me. Rev Stat tit 17-A, § 35(3) (defining recklessness); id. § 207(1)(A) (simple assault); id. § 207-A(1)(A) (domestic violence assault) Therefore, to sustain a Maine conviction for this subsumed offense, the defendant need not intend that physical contact occur nor intend that the contact be considered offensive

does constitute a violation of the Lautenberg Amendment, the federal convictions at issue here cannot stand.[11]

---

[11] Despite the foregoing, the majority opinion offhandedly rejects the relevance of the mens rea for battery under the common law See ante, at 16 ("The parties agree that, under Castleman, the term 'use of physical force' also incorporates the common law mens rea for battery They disagree about whether reckless acts could or could not constitute batteries at common law, and each side marshals support for its view We decline the parties' invitation to define the mens rea of a common law battery ") (citations omitted) At the same time, the majority cites Castleman for the proposition that the "use" of physical force includes offensive contact, due to the common-law meaning of "force" for purposes of battery Id. The majority opinion thus relies on the actus reus for battery under the common law, but simultaneously rejects the relevance of the accompanying mens rea for common-law battery See id. In so doing, the majority fails to sufficiently justify its decision to "decline" the parties' "invitation" to consider the import of the mens rea of common-law battery to the question at bar Such a decision requires justification, particularly because the Supreme Court in Castleman also extended an "invitation" for us to consider this issue when it explained that Congress intended to classify as a "'misdemeanor crime of domestic violence' the type of conduct that supports a common-law battery conviction " See Castleman, 134 S Ct at 1411

Nothing in Castleman suggests that the phrase "type of conduct" refers only to the actus reus for battery and not also the accompanying mens rea. Indeed, the contrary conclusion makes far more sense If Congress meant to incorporate the common-law crime of battery, it most likely meant to incorporate both the actus reus and its accompanying mens rea See, e.g., United States v Zhen Zhou Wu, 711 F 3d 1, 18 (1st Cir 2013) ("'In the criminal law, both a culpable mens rea and a criminal actus reus are generally required for an offense to occur '" (quoting United States v Apfelbaum, 445 U S 115, 131 (1980))); United States v Cornelio-Pena, 435 F 3d 1279, 1286 (10th Cir 2006) (stating that "most crimes require[] both mens rea and actus reus"); cf. United States v Freed, 401 U.S 601, 607-08 (1971) (explaining that when "Congress borrows terms of art" from the common law, "it presumably knows and adopts the cluster of ideas that were attached to each borrowed word" (internal quotation marks and citation omitted))

After giving careful consideration to the issues involved, engaging in the necessary statutory interpretation and legal analysis, and applying the relevant precedent, I heed the Supreme Court's direction and follow the lead of our sister circuits in disagreeing with the majority's conclusion Therefore, I respectfully dissent

I Legal Background

A. The Statutory Framework

1 The Lautenberg Amendment

The defendants here were charged with violating the Lautenberg Amendment to the Gun Control Act of 1968, now codified at 18 U S C. § 922(g)(9) (the "Lautenberg Amendment" or "§ 922(g)(9)") Under the Lautenberg Amendment, it is unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence, to possess in or affecting commerce, any firearm or ammunition " 18 U.S C § 922(g)(9) For these purposes, a "misdemeanor crime of domestic violence" is further defined in 18 U.S C § 921(a)(33)(A) as an offense that:

> (I) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or

> guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[ ]

Id. § 921(a)(33)(A) (emphases added)

2 The Relevant Maine Assault Statutes

The defendants argue that the relevant Maine assault statutes do not "ha[ve], as an element, the use or attempted use of physical force " See id. Under Maine law, a defendant is guilty of "domestic violence assault" if (1) the defendant violates the Maine simple assault provision, and (2) "the victim is a family or household member " See Me Rev Stat tit 17-A, § 207-A(1)(A)

Turning to the simple assault provision in the Maine Criminal Code, a person is guilty of "assault" if "[t]he person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person." See § 207(1)(A) Thus, there are six different, divisible permutations of the Maine simple assault statute, each of which can form the basis for a section 207 assault conviction. United States v Carter, 752 F 3d 8, 17-18 (1st Cir 2014) ("The Maine general-purpose assault statute is divisible into six permutations of subsumed offenses, based on the combination of one element from each of two categories: (1) mens rea ('intentionally, knowingly or recklessly'), and (2) actus reus ('causes bodily injury or offensive physical contact to another person') " (quoting § 207(1)(A))) These six subsumed offenses are illustrated in the following chart:

The six variants of the Maine simple assault statute:

Maine simple assault statute, Me Rev Stat tit 17-A, § 207(1)(A)		**Actus Reus**	
		causes bodily injury	**causes offensive physical contact.**
Mens Rea	**Intentionally**	1 Intentionally causes bodily injury	4 Intentionally causes offensive physical contact
	Knowingly	2 Knowingly causes bodily injury	5 Knowingly causes offensive physical contact
	Recklessly	3 Recklessly causes bodily injury	6 Recklessly causes offensive physical contact

In Maine state court, Armstrong was convicted of Maine domestic-violence assault under section 207-A, and Voisine was convicted of Maine simple assault under section 207 [12] These prior convictions served as the predicate offenses for the defendants' § 922(g)(9) charges, which are the subject of the instant appeal A simple assault statute lacking a domestic-relationship element (such as Voisine's prior offense of conviction in Maine) can nonetheless serve as the predicate offense for a misdemeanor crime of domestic violence, so long as the domestic-relationship element

---

[12] Violation of either provision -- the general assault offense or "domestic violence assault" -- constitutes a "Class D" crime under the Maine Criminal Code, which is equivalent to a misdemeanor See State v Allen, 377 A 2d 472, 475 n 4 (Me 1977) ("We therefore deem Class D and Class E crimes to be the Criminal Code equivalents of misdemeanors ")

is proved in the subsequent federal prosecution See United States v Hayes, 555 U S 415, 418 (2009) (holding "that the domestic relationship, although it must be established beyond a reasonable doubt in a § 922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense")

B. The Categorical and Modified Categorical Approaches

Given the foregoing statutory framework, we must analyze whether the elements of the Maine assault statute necessarily fulfill the requirements of the Lautenberg Amendment In cases such as this -- where a court must decide whether a prior conviction for an earlier offense (like assault) satisfies one of the elements of the offense in a subsequent prosecution (here, for example, whether the earlier offense "has, as an element, the use of physical force," 18 U S C § 921(a)(33)(A)) -- the court determines whether it is appropriate to apply the categorical approach or the modified categorical approach

1 The Categorical Approach

In Taylor v United States, 495 U S 575, 600 (1990), the Supreme Court described the categorical approach, under which courts "look[] only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions " See also United States v Dávila-Félix, 667 F 3d 47, 56 (1st Cir 2011) (same) If the "statutory definition" of the prior offense necessarily meets the requirements of the subsequent

offense at issue, then the court can determine that a conviction for the prior offense categorically constitutes a valid predicate offense for purposes of the later prosecution See Castleman, 134 S Ct at 1414

2 The Modified Categorical Approach

Some statutes, like the Maine assault statutes at issue here, are "divisible": they "set[] out one or more elements of the offense in the alternative " See Descamps v United States, 133 S Ct 2276, 2281 (2013) For these statutes, some permutations or variants of the subsumed offenses may categorically meet the requirements of the subsequent offense, whereas others may not Accordingly, for these divisible statutes, courts may apply the "modified categorical approach" to determine which variant or subsumed offense formed the basis for the prior conviction, and thus whether that prior conviction can serve as a valid predicate offense for the subsequent prosecution See Castleman, 134 S Ct at 1414 Under this approach, a court may "consult[ ] the trial record -- including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms" -- in order to "determine which statutory phrase was the basis for the conviction" under such a divisible statute Johnson, 559 U S at 144 These documents are often called "Shepard documents," after

Shepard v United States, 544 U S 13 (2005) (plurality opinion) See, e.g., Carter, 752 F 3d at 19-20 & 19 n 12

3 Application

Under established precedent not called into doubt by Castleman and not challenged here, certain subsumed offenses under the Maine assault statutes (such as the intentional or knowing causation of bodily injury) are unequivocally valid predicate offenses for the Lautenberg Amendment See Castleman, 134 S Ct at 1415 ("It is impossible to cause bodily injury without applying force in the common-law sense," and "the knowing or intentional application of force is a 'use' of force ") If the Shepard documents showed that the defendants' prior assault convictions were for those particular subsumed offenses, for example, then we would be able to apply the modified categorical approach and affirm the defendants' Lautenberg Amendment convictions without reaching the recklessness issue See Carter, 752 F 3d at 18 n 11 (reasoning that under the modified categorical approach, if the Shepard documents showed that the defendant's prior Maine conviction was for intentional or knowing conduct, then the court could affirm his conviction under the Lautenberg Amendment) The parties agree, however, that the Shepard documents for Armstrong's and Voisine's underlying Maine convictions are inconclusive and do not reveal which variants of the Maine assault statutes served as the bases

for their convictions Therefore, the modified categorical approach cannot resolve this appeal

Rather, we must apply the categorical approach to determine whether the statutory definitions of the Maine assault provisions necessarily include the "use or attempted use of physical force " See 18 U S C §§ 921(a)(33)(A), 922(g)(9); see also Castleman, 134 S Ct at 1414 Under the categorical approach, if any one of the six variants of the Maine assault statute does not necessarily constitute the "use of physical force," then the defendants' convictions must be reversed. Put differently, to affirm the defendants' convictions under the categorical approach, all of the subsumed offenses under the Maine statute must have the "use or attempted use of physical force" as an element 18 U S.C §§ 921(a)(33)(A); see also United States v Holloway, 630 F 3d 252, 257 (1st Cir 2011) (stating that under the categorical approach, "the [prior] conviction may only serve as a predicate offense if each of the possible offenses of conviction would qualify" as individually satisfying the offense in the subsequent prosecution (citing Shepard, 544 U S at 26)) The defendants focus their argument on the sixth and least severe subsumed offense: the "reckless" causation of "offensive physical contact " Therefore, we must apply the governing precedent to decide whether this statutory definition necessarily involves the "use of physical force "

C. The Supreme Court's Decisions in Leocal and Johnson

The Supreme Court's opinions in Leocal v Ashcroft, 543 U S 1 (2004), and Johnson v United States, 559 U.S. 133 (2010), provided foundational reasoning for subsequent cases relevant to this appeal In both of these cases, the Supreme Court engaged in statutory interpretation to determine whether the offenses underlying prior state convictions had, as an element, the "use" of physical force as required for purposes of a subsequent federal proceeding

1 Leocal

In Leocal, the Supreme Court examined a similar question to that facing us today, regarding parallel language in the statutory definition of a "crime of violence" under 18 U.S C § 16(a) Under that statute, a "crime of violence" includes "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another " 18 U S C § 16(a) (emphasis added) The petitioner in Leocal had previously been convicted in Florida state court for driving under the influence of alcohol (DUI) and causing serious bodily injury Leocal, 543 U.S at 3 The Supreme Court held that the petitioner's DUI conviction was not a crime of violence under 18 U S C § 16 Id. at 4 In so holding, the Court explained that "'use' requires active employment," reasoning that "a person would 'use physical force against' another when pushing him

[but not] by stumbling and falling into him." Id. Giving the operative phrase in 18 U S.C. § 16(a) its ordinary and natural reading, in context, the Leocal Court held that the "'use of physical force against the person or property of another'" requires "a higher degree of intent than negligent or merely accidental conduct " Id. (quoting 18 U S C § 16(a)) The Court also interpreted parallel language in 18 U S C § 16(b), giving that language "an identical construction" and "requiring a higher mens rea than the merely accidental or negligent conduct involved in a DUI offense " Id. at 11

Additionally, the Court considered the fact that it was "ultimately determining the meaning of the term 'crime of violence.'" Id. It reasoned that "[t]he ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses " Id. Therefore, the Court concluded that "[i]nterpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes " Id. Importantly for the instant case, the Leocal Court held only that negligent and accidental conduct did not constitute the "use" of force and thus a crime of violence under 18 U.S.C § 16; the Court did not reach the question whether reckless conduct would be

sufficient Id. at 13 ("This case does not present us with the question whether a state or federal offense that requires proof of the reckless use of force against a person or property of another qualifies as a crime of violence under 18 U S.C. § 16 ")

2 Johnson

In Johnson, the Supreme Court considered a related question: "whether the Florida felony offense of battery by '[a]ctually and intentionally touch[ing]' another person, Fla. Stat § 784 03(1)(a), (2) (2003), 'has as an element the use of physical force against the person of another,' 18 U S.C § 924(e)(2)(B)(I), and thus constitutes a 'violent felony' under the Armed Career Criminal Act, § 924(e)(1) " Johnson, 559 U S at 135 (alterations in original) The Court observed that "the element of 'actually and intentionally touching' under Florida's battery law is satisfied by any intentional physical contact, 'no matter how slight '" Id. at 138 (quoting State v Hearns, 961 So 2d 211, 218 (Fla 2007)) Even "[t]he most 'nominal contact,' such as a 'ta[p] on the shoulder without consent,'" is sufficient to constitute a violation of the Florida law Id. (second and third alterations in original) (quoting Hearns, 961 So 2d at 219)

In determining the definition of "physical force" under the Armed Career Criminal Act ("ACCA"), the Court sought to give the phrase "its ordinary meaning" while keeping in mind the context of its inquiry: defining the statutory category of violent

felonies Id. at 138-40 In that context, the Court thought "it clear that in the context of a statutory definition of 'violent felony,' the phrase 'physical force' means violent force -- that is, force capable of causing physical pain or injury to another person " Id. at 140 The Johnson Court explicitly limited its holding to the ACCA, asserting that its decision would not extend to the Lautenberg Amendment See id. at 143-44 ("We have interpreted the phrase 'physical force' only in the context of a statutory definition of 'violent felony ' We do not decide that the phrase has the same meaning in the context of defining a misdemeanor crime of domestic violence The issue is not before us, so we do not decide it.")

D Pre-Castleman First Circuit Precedent: Nason, Booker, Armstrong I, and Voisine I

Prior to the Supreme Court's decision in Castleman, the defendants' arguments were squarely foreclosed by First Circuit precedent; it is this precedent that the Supreme Court has instructed us to reconsider

In United States v Nason, 269 F 3d 10 (1st Cir 2001), which also considered the interplay between the Maine simple assault statute and the Lautenberg Amendment, we held that the actus reus of "offensive physical contact" necessarily involved the "use or attempted use of physical force," id. at 11-12, 21 Synthesizing the definitions of "physical force" from Black's Law Dictionary and other dictionaries, we determined that "physical

force may be characterized as power, violence, or pressure directed against another person's body " Id. at 16 We thus held that § 922(g)(9) does not require that the predicate offense involve "bodily injury," but rather can be satisfied by "any physical force" -- including offensive physical contact -- "regardless of whether that force resulted in bodily injury or risk of harm." Id. at 16-18 Therefore, Nason established that either actus reus prong of the Maine assault statute -- bodily injury or offensive physical contact -- could serve as a valid predicate conviction for purposes of § 922(g)(9) Id. at 21 ("[B]oth [actus reus] variants of assault regulated under Maine's general-purpose assault statute necessarily involve the use of physical force ")

Whereas Nason focused on the actus reus variants of the Maine assault statute for purposes of the Lautenberg Amendment, we later focused on the mens rea variants in United States v Booker, 644 F 3d 12 (1st Cir 2011) In Booker, we rejected the argument that only an intentional offense could constitute a misdemeanor crime of domestic violence under § 922(g)(9) Id. at 13-14 The appellants in Booker sought to rely on the Supreme Court's decisions in Leocal and Johnson, analogizing to the definition of "crime of violence" under 18 U S.C § 16 and the definition of "violent felony" under the ACCA, 18 U S.C § 924(e) Id. at 18-19 We held that those other statutes were not sufficiently analogous to dictate the result in Booker, reasoning that, for example,

"[w]hereas the ACCA seeks to protect society at large from a diffuse risk of injury or fatality at the hands of armed, recidivist felons, § 922(g)(9) addresses an acute risk to an identifiable class of victims -- those in a relationship with a perpetrator of domestic violence " Id. at 21 We thus turned to the "plain, unambiguous language of § 922(g)(9)," finding that "the statutory definition of 'misdemeanor crime of domestic violence' does not prescribe an intentional mens rea " Id. (quoting 18 U S C § 922(g)(9)) Therefore, we held "that an offense with a mens rea of recklessness may qualify as a 'misdemeanor crime of domestic violence' under § 922(g)(9) " Id. (quoting 18 U S.C. § 922(g)(9))

On the initial appeal in this case, United States v Armstrong, 706 F 3d 1, 5 (1st Cir 2013) ("Armstrong I"), vacated, 134 S Ct 1759 (2014), we considered Armstrong's arguments that the Lautenberg Amendment's prohibition on gun ownership does not apply to non-violent offensive physical contact We found the defendant's argument on this issue to be squarely foreclosed by our prior decisions in Nason and Booker Id. at 2 (citing Booker, 644 F 3d 12; Nason, 269 F 3d 10) On that basis, we rejected Armstrong's statutory interpretation arguments and affirmed the decision of the district court Id. at 2-6, 8 That same day, we issued an opinion in United States v Voisine, 495 F App'x 101 (1st Cir 2013) (per curiam) ("Voisine I"), vacated sub nom.

Armstrong v United States, 134 S Ct 1759 (2014) In a per curiam opinion, we stated that Voisine had raised "the exact same arguments" as those raised in Armstrong I Id. Because there were "no pertinent factual differences distinguishing" Voisine I from Armstrong I, we incorporated Armstrong I's reasoning into the Voisine I per curiam opinion and affirmed the district court's decision Id. at 102 Both defendants appealed our decisions in to the Supreme Court

E Castleman and Its Aftermath

1 The Supreme Court's Castleman Opinion

Approximately one year later, while the petitions for writs of certiorari were pending in Armstrong I and Voisine I, the Supreme Court issued its opinion in Castleman, 134 S Ct. 1405 The defendant in Castleman had pleaded guilty to a Tennessee offense for "intentionally or knowingly caus[ing] bodily injury to" the mother of his child. Id. at 1408-09 After federal authorities subsequently learned that he was selling firearms on the black market, Castleman was indicted on two counts of violating the Lautenberg Amendment Id. at 1409 He argued that the Tennessee statute did not have the use, or attempted use, of physical force as an element of the offense. Id. (citing 18 U S.C § 921(a)(33)(A)(ii)) The Sixth Circuit affirmed the dismissal of Castleman's convictions on the § 922(g)(9) counts, holding that the Tennessee conviction was not a valid predicate offense because

Castleman might have been convicted for "'caus[ing] a slight, nonserious physical injury with conduct that cannot be described as violent '" See id. at 1409-10 (quoting United States v Castleman, 695 F 3d 582, 590 (6th Cir 2012)) The Supreme Court reversed, reasoning that Castleman had pleaded guilty to intentionally or knowingly causing bodily injury, which "necessarily involves the use of physical force " Castleman, 134 S Ct at 1414

The Court explained that "physical force" for purposes of § 922(g)(9) encompasses "the common-law meaning of 'force' -- namely, offensive touching " Id. at 1410 The Court explained that "'[d]omestic violence' is not merely a type of 'violence'; it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context" -- acts like slapping, shoving, pushing, grabbing, hair-pulling, and spitting Id. at 1411 & n 5

The Castleman Court further explained that there are two main categories of assault or battery laws generally used to prosecute domestic abusers: "those that prohibit both offensive touching and the causation of bodily injury, and those that prohibit only the latter " Id. at 1413 Interpreting "physical force" to exclude a mere "offensive touching" would have rendered the Lautenberg Amendment "ineffectual in at least 10 States -- home to nearly thirty percent of the Nation's population -- at the time of its enactment " Id. (footnote omitted) Therefore, the Court

held that the "physical force" requirement is satisfied "by the degree of force that supports a common-law battery conviction" -- including an offensive touching Id.

The Court considered whether it could apply the "categorical approach" articulated in Taylor, 495 U S 575, to resolve the issue, asking if the elements of the Tennessee statute necessarily met the requirements of § 922(g)(9) Castleman, 134 S Ct at 1414 If the answer were in the affirmative, then the Court could conclude that "a domestic assault conviction in Tennessee categorically constitutes a 'misdemeanor crime of domestic violence '" Id.

Expressing skepticism regarding such a categorical conclusion, the Court stated that "[i]t does not appear that every type of assault defined by [the Tennessee statute] necessarily involves 'the use or attempted use of physical force, or the threatened use of a deadly weapon.'" Id. at 1413-14 (quoting 18 U S C § 921(a)(33)(A)) For example, the Court reasoned that under the Tennessee statute, "[a] threat may not necessarily involve a deadly weapon, and the merely reckless causation of bodily injury may not be a 'use' of force " Id. at 1414 The Court noted that in Leocal it had "reserved the question whether a reckless application of force could constitute a 'use' of force," id. at 1414 n 8 (citing Leocal, 543 U S 1), but emphasized that "the Courts of Appeals have almost uniformly held that

recklessness is not sufficient," id. (contrasting our holding in Booker, 644 F 3d 12, with the decisions of ten of our sister courts of appeals: the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits) The Court declined to hold that a conviction under the Tennessee statute categorically constitutes a misdemeanor crime of domestic violence for purposes of § 922(g)(9) See id. at 1414

On the heels of its Castleman opinion, the Supreme Court vacated our prior decisions in Voisine I and Armstrong I, and it remanded those two cases for reconsideration in light of its decision in Castleman. See Armstrong I, 134 S Ct 1759 ("Judgment vacated, and case remanded to the United States Court of Appeals for the First Circuit for further consideration in light of United States v Castleman, [134 S. Ct 1405] (2014) ") There is little disagreement that this remand order calls for us to consider the impact of Castleman's Footnote Eight on our prior precedent, particularly Booker and Nason. In that footnote, the Supreme Court contrasted our Booker holding with the decisions of ten of our sister circuits, noting that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient" to "constitute a 'use' of force " Id. at 1414 n 8

2 The First Circuit's Carter Opinion

In the wake of Castleman and the Supreme Court's remand of the instant cases, we issued an opinion in United States v Carter, 752 F 3d 8 (1st Cir 2014) Among other arguments, the defendant in that case, Wayne Carter, raised similar issues to those examined in Armstrong I Id. at 9-10 Carter had been convicted in 1997 of a misdemeanor assault in Maine, after his live-in girlfriend at the time, Annie Eagan, told police officers that Carter spit in her face and shoved her right shoulder Id. at 10 Eagan reported that she was not hurt, that she did not want Carter arrested or charged with an offense, and that she only wanted him removed from the house Id. at 10-11 Nonetheless, the Maine state prosecutor charged Carter under Maine's general-purpose assault statute, to which Carter pleaded guilty and was sentenced to time served: thirty days in jail Id. at 11

Approximately thirteen years later, in 2010, Carter obtained a loan by pawning a rifle that he had inherited from his dead father Id. at 10 A records check and further investigation in connection with his pawning activities revealed Carter's prior misdemeanor assault conviction. Id. The pawn shop's records showed that Carter had pawned and redeemed three separate rifles multiple times between 2007 and 2010 Id. at 11 All of the rifles were inherited from his father Id. at 11 n 2 "The firearms were kept in a locked cabinet at his mother's house, and

Carter only physically possessed the rifles in connection with pawning them." Id. Based on the foregoing, Carter was charged in a one-count indictment for violating the Lautenberg Amendment's prohibition on gun possession by those convicted of a misdemeanor crime of domestic violence Id. at 11 After entering a conditional guilty plea, reserving his right to appeal, Carter was sentenced by the district court to be imprisoned for twelve months and one day -- a downward variance from the bottom of the Sentencing Guidelines range: eighteen months Id. at 9, 12 He then appealed, arguing, among other things, that the commission of simple assault by recklessly causing offensive physical contact does not constitute the "use of physical force" as required to establish a misdemeanor crime of domestic violence under the Lautenberg Amendment Id. at 10

On appeal, we noted that although this argument was previously foreclosed by our holding in Booker, "the Supreme Court's recent decision in Castleman casts doubt upon this holding " Id. at 18 (citing Castleman, 134 S Ct at 1414 & n 8) In support of that assertion, we cited the Supreme Court's statements that "'the merely reckless causation of bodily injury under [the Tennessee assault statute] may not be a "use" of force,'" id. (alteration in original) (quoting Castleman, 134 S. Ct at 1414), and that "'the Courts of Appeals have almost uniformly held that recklessness is not sufficient' to 'constitute

a "use" of force,'" id. (quoting Castleman, 134 S Ct at 1414 n.8) Although Castleman had not directly overruled our prior decision in Booker, we noted that these statements from the Supreme Court provided a "'sound reason' for thinking that the Booker panel might well 'change its collective mind' in light of Castleman." Id. at 18 n 11 (quoting United States v Rodriguez-Pacheco, 475 F 3d 434, 442 (1st Cir 2007))

Despite the Supreme Court's statements in Castleman calling into question our prior precedent on this question, it was unnecessary in Carter to answer the recklessness issue, because Carter potentially could have been resolved via the modified categorical approach: the underlying Shepard documents might have "ultimately show[n] that Carter's conviction was under one of the other two mens-rea prongs of the statute -- 'intentionally' or 'knowingly'" Id. We thus observed that under Castleman, "the validity of Carter's § 922(g)(9) conviction may depend on which mens-rea prong of the Maine general-purpose assault statute served as the basis for his guilty plea and conviction." Id. at 18 Examining the record for Shepard documents that could determine which variant of the Maine assault statute was the basis for Carter's conviction, we found the record incomplete and undeveloped: it was unclear whether such documents existed. See id. at 20-21 ("It is not clear whether there are any other 'approved' Shepard documents or comparable judicial records

available with respect to Carter's prior assault conviction [T]he record is insufficiently developed to determine which variant of the Maine general-purpose assault statute served as the basis for Carter's conviction ") Accordingly, we "remand[ed] the case to the district court to allow the parties to further develop the record on this issue," consistent with the Supreme Court's opinion in Castleman Id. at 21 In so doing, we reserved the question presented by the Supreme Court's vacatur of Armstrong I and Voisine I in light of Castleman, allowing us to squarely address that issue in the instant remand.

3 District Courts' Application of Castleman and Carter

To date, three different district court judges in the First Circuit have applied the reasoning of Castleman's Footnote Eight regarding these issues; all three opinions concluded that a recklessly committed Maine assault does not necessarily involve the "use" of physical force and thus is not categorically a misdemeanor crime of domestic violence United States v Sales, No. 2:13-CR-137-NT, 2014 WL 3405658 (D. Me July 11, 2014); United States v Carter, No 2:10-cr-00155-GZS, 2014 WL 3345045 (D. Me July 8, 2014); United States v Hines, No 1:12-cr-00204-JAW, 2014 WL 1875164 (D. Me May 9, 2014) Each of these three cases is examined below, in the order that they were decided.

a. Hines

The first district court case to apply the decisions in Castleman and Carter to these issues was Hines, 2014 WL 1875164 The defendant in Hines had pleaded guilty in Maine state court to violating the domestic violence assault statute; the Shepard documents revealed no further details regarding the conduct underlying this offense Id. at *2 Before the district court, the defendant argued, among other things, that a mens rea of recklessness could not satisfy the "use of force" requirement under the Lautenberg Amendment Id. at *4 The district court noted that pre-Castleman First Circuit precedent had previously foreclosed this argument, and "[t]he question is how Castleman affects the resolution of the issues [the defendant] has raised." Id. at *7

Examining Castleman's Footnote Eight, the court observed that "[t]his footnote, which cited ten circuit courts as concluding that reckless conduct did not constitute 'use of physical force,' strongly hinted that the First Circuit's Booker decision was an outlier " Id. at *8 The district court then considered the Supreme Court's vacatur of Armstrong I in light of Castleman Id. The court explained that "[r]eading Supreme Court tea leaves is chancy, but the First Circuit decision in Armstrong I was consistent with Castleman except for the Circuit Court's brief recklessness analysis " Id. Thus, the court found that "[i]t is

a short logical step to conclude that the reason the Supreme Court vacated the First Circuit decision in Armstrong I was to pull the First Circuit in line with the other ten circuit courts in the recklessness analysis " Id. Accordingly, on the basis of Castleman, the vacatur of Armstrong I, and Carter, the district court concluded that it is "questionable" whether a Maine conviction for domestic assault -- "without more" -- qualifies as a valid predicate conviction for the Lautenberg Amendment Id. at *9

b. Carter

Following our remand instructions in Carter, the district court permitted the parties to further develop the record with Shepard documents to determine which subsumed variant of the Maine assault statute formed the basis of Carter's prior state misdemeanor conviction Carter, 2014 WL 3345045, at *6 The only additional document available was a transcript of Carter's plea colloquy in Maine state court, in which Carter's attorney stated that "'discovery shows that this was no more than a push on the right shoulder, that it was nothing more serious than that '" Id. at *7 Accordingly, on the basis of all the Shepard documents, the district court was "unable to identify the offense of Carter's conviction " Id.

The district court cited Hines, including the statement that "'[i]t is a short logical step to conclude that the reason the

Supreme Court vacated the First Circuit decision in [Armstrong I] was to pull the First Circuit in line with the other ten circuit courts in the recklessness analysis '" Id. at *5 (quoting Hines, 2014 WL 1875164, at *8) The court further observed that "while the statement in Castleman was via dictum in a footnote, 'it is much more than an offhand comment [C]arefully considered statements of the Supreme Court, even if technically dictum, must be accorded great weight and should be treated as authoritative '" Id. at *6 (quoting Crowe v Bolduc, 365 F 3d 86, 92 (1st Cir 2004)) (internal quotation marks omitted) Stating that it "cannot ignore the guidance of the Supreme Court and the First Circuit in Castleman, Armstrong and Carter," the district court concluded that "Carter's conviction may only stand if it was premised on more than accidental, negligent or reckless conduct " Id. Faced with the absence of any Shepard documents permitting such a finding, the district court granted Carter's motion to dismiss the indictment, holding that his 1997 conviction could not serve as a predicate misdemeanor for the Lautenberg Amendment Id. at *7

c. Sales

Sales, 2014 WL 3405658, is the third and, to date, final district court case to apply Castleman and Carter. The defendant in that case, Kenneth Sales, had pleaded guilty in Vermont state court to one count of "assault-simple-mutual affray" because he "engaged in a fight or scuffle entered into by mutual consent "

Id. at *1 (citing Vt Stat Ann tit 13, § 1023) In that plea colloquy, the Vermont Superior Court judge explained that Sales "recklessly caused bodily injury to a person, and that it was in a fight or scuffle entered into by mutual consent " Id. The judge further explained that "there was a physical altercation between [Sales] and [his girlfriend] and that in the course of it [he] at least recklessly caused bodily injury to her, being a scratch or a sort of cut that she received " Id. Explaining the actus reus of bodily injury, the judge stated that "[b]odily injury is any sort of injury, it doesn't have to be a broken bone or anything like that, it can be a bruise, a cut, kind of anything that hurts " Id. With respect to the mens rea, the judge explained that "[r]ecklessly means you did not have to intend a particular result, but you engaged in conduct that was not what a reasonable person would do in these circumstances, and had a very high risk that the result would happen " Id. Subsequent to this assault conviction in Vermont state court, Sales was charged with a violation of the Lautenberg Amendment in federal district court in Maine Id. at *2

The district court reviewed the governing precedent, including Castleman, Carter, and the previous two district court decisions described above, Hines and Carter Id. at *2-3 Observing that the Castleman court emphasized Leocal's holding that "use" requires active employment, the district court further

highlighted that "[t]he Supreme Court also pointed out that Booker is out of step with other circuit courts that have held that recklessness is not sufficient to constitute a 'use' of force " Id. at *3 (citing Castleman, 134 S Ct at 1414 n 8) Accordingly, the district court opined that "the Supreme Court's remand of Armstrong 'in light of Castleman' is fairly construed as a directive to the First Circuit to reconsider whether an assault committed recklessly is sufficient to meet the federal definition of a misdemeanor crime of domestic violence " Id. The district court agreed with Chief Judge Woodcock that "'[r]eading Supreme Court tea leaves is chancy,'" id. at *4 (quoting Hines, 2014 WL 1875164 at *8), but concluded that "it is hard to miss the message here," id. The court observed that the First Circuit may yet "decide that recklessness is sufficient," but that it would be "presumptuous" for the district court "to make that determination " Id. Therefore, the district court dismissed the defendant's indictment Id.

II. Discussion

On remand, the relevant inquiry is whether the "reckless" causation of "offensive physical contact" under Maine law necessarily constitutes the "use or attempted use of physical force" for purposes of the Lautenberg Amendment Compare Me Rev Stat tit 17-A, § 207, with 18 U S C §§ 921(a)(33)(A), 922(g)(9) As a matter of statutory interpretation, we need to compare the

text of each side of the equation: (a) the definition of the "reckless" causation of "offensive physical conduct" under the Maine assault statutes; and (b) the definition of the "use of physical force" under the federal Lautenberg Amendment The former inquiry is a question of Maine state law, while the latter is a question of federal law Applying the relevant precedent, this discussion concludes that the reckless causation of offensive physical contact in Maine does not necessarily constitute the "use" of physical force and thus is not categorically a "misdemeanor crime of domestic violence" under the Lautenberg Amendment

A. The Meaning of the "Reckless" Causation of "Offensive Physical Contact" Under Maine Law

1 The Meaning of "Reckless"

Under the applicable definition in the Maine Criminal Code, "[a] person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result " Me Rev Stat. tit 17-A, § 35(3)(A) Additionally, "the disregard of the risk, when viewed in light of the nature and purpose of the person's conduct and the circumstances known to the person, must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation " Id. § 35(3)(C)

The majority opinion describes this definition of "recklessness" as involving "a substantial amount of deliberateness

and intent " Ante, at 18 To support this assertion, the majority follows the government's brief in emphasizing that the definition requires that a person "consciously" disregard the risk involved, and that this disregard involves a "gross deviation" from the standard of reasonable and prudent conduct Id. at 18-19 Relying on this language, the government argues that "recklessness lies rather close to 'knowingly'" on the "volitional scale," and that recklessness "is arguably part and parcel of 'willfully '" Continuing, the government asserts that "[r]ecklessly is more akin to deliberately or knowingly " I disagree

Contrary to the claim that the Maine definition of recklessness involves "a substantial amount of deliberateness and intent," the Maine definition is in fact a textbook definition of recklessness, falling squarely within the standard definitions of recklessness in various jurisdictions and as defined by multiple authorities Indeed, the Maine definition is materially indistinguishable from the definition of recklessness in the Model Penal Code Cf. Model Penal Code § 2 02(2)(c) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the

standard of conduct that a law-abiding person would observe in the actor's situation.") This Model Penal Code definition contains all of the elements and precise language highlighted by the majority as supposedly establishing "a substantial amount of deliberateness and intent " Cf. ante, at 18-19 ("consciously" disregards, "nature and purpose of the person's conduct and the circumstances known to [him]," and "gross deviation" from the standard of care) (emphases supplied by the majority)

As revealed in the chart below, the Maine definition of recklessness is also consistent with the equivalent definitions in the Model Penal Code, Black's Law Dictionary, and the majority of First Circuit jurisdictions

Source, Authority, or Jurisdiction	**Definition**
Model Penal Code § 2 02(2)(c) (emphases added)	"Recklessly A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation "
Black's Law Dictionary 1462 (10th ed. 2014) (emphases added)	"reckless, adj Characterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash • Reckless conduct is much more than mere negligence: it is a gross deviation from what a reasonable person would do. See recklessness. Cf careless; wanton "

Black's Law Dictionary 1462 (10th ed. 2014) (emphasis added)	"recklessness, n 1 Conduct whereby the actor does not desire harmful consequence but nonetheless foresees the possibility and consciously takes the risk. • Recklessness involves a greater degree of fault than negligence but a lesser degree of fault than intentional wrongdoing 2 The state of mind in which a person does not care about the consequences of his or her actions. -- Also termed heedlessness Cf wantonness."
Maine	"A person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result [T]he disregard of the risk, when viewed in light of the nature and purpose of the person's conduct and the circumstances known to the person, must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation." Me. Rev Stat tit 17-A, § 35(3)(emphases added) (subsections defining "recklessly" under the Maine Criminal Code section setting out "Definitions of culpable states of mind"); see also Stein v Me. Criminal Justice Acad., 95 A.3d 612, 618 (Me. 2014) (applying the foregoing statutory definitions of "recklessly" to the Maine general-purpose assault statute, § 207(1)(A))

Massachusetts	"Reckless failure to act involves an intentional or unreasonable disregard of a risk that presents a high degree of probability that substantial harm will result to another " Sandler v Commonwealth, 419 Mass 334, 644 N.E.2d 641, 643 (Mass. 1995) "[R]eckless conduct involves a degree of risk and a voluntary taking of that risk so marked that, compared to negligence, there is not just a difference in degree but also a difference in kind." Id., 644 N.E.2d at 644 "To prove reckless battery, the Commonwealth must establish '(1) that the defendant's conduct involve[d] a high degree of likelihood that substantial harm will result to another, or that it constitute[d] disregard of probable harmful consequences to another and (2) that, as a result of that conduct, the victim suffered some physical injury '" United States v Holloway, 630 F 3d 252, 261 (1st Cir 2011) (quoting Commonwealth v Welch, 16 Mass App Ct 271, 450 N.E.2d 1100, 1102-03 (Mass. App. Ct 1983)) "To constitute wanton or reckless conduct, as distinguished from mere negligence, grave danger to others must have been apparent and the defendant must have chosen to run the risk rather than alter his conduct so as to avoid the act or omission which caused the harm." Commonwealth v Welansky, 316 Mass 383, 55 N.E.2d 902, 910 (Mass 1944) (internal quotation marks omitted)
New Hampshire	"'Recklessly ' A person acts recklessly with respect to a material element of an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct The risk must be of such a nature and degree that, considering the circumstances known to him, its disregard constitutes a gross deviation from the conduct that a law-abiding person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of having voluntarily engaged in intoxication or hypnosis also acts recklessly with respect thereto." N.H. Rev Stat. § 626:2 (II)(c) (emphases added)

Puerto Rico	Old: "[W]hen the actor has foreseen or is conscious that there exists a high probability that his conduct will produce the criminal act " P.R. Laws Ann tit. 33, § 5035 (2012) (unofficial translation supplied) New: "A person acts recklessly when he is conscious that his conduct generates a substantial and unjustified risk that the legally prohibited result or circumstance will be produced." 2014 P.R. Laws No 246, art 12 (enacting S.B. 1210, and modifying art 22(3) of Law 146-2012) (unofficial translation supplied) [13]

[13] The situation in Puerto Rico merits some further explanation Historically, under Puerto Rico's Penal Code, there were two culpable mental states: "intent" and "negligence " See P.R. Laws Ann tit 33, §§ 4650-4652 (2004) The definition of "intent" included three variants, generally corresponding to the concepts of "purposeful," "knowing," and "reckless" conduct under the Model Penal Code See id. § 4651; see also Dora Nevares-Muñiz, Recodification of Criminal Law in a Mixed Jurisdiction: The Case of Puerto Rico, 12 1 Elec J Comp L. 16 (May 2008), available at http://www ejcl org/121/art121-14 pdf In the 2012 version of the Puerto Rico Penal Code, the third definition of "intent" covered reckless conduct: "when the actor has foreseen or is conscious that there exists a high probability that his conduct will produce the criminal act " P.R. Laws Ann tit 33, § 5035 (2012) (unofficial translation supplied)

In 2014, a new law was proposed, passed by both the Puerto Rico Senate and the House of Representatives, and sent to the Governor for his approval See S.B 1210 (P.R. 2014) That law was signed and approved on December 26, 2014, and it takes effect on March 26, 2015 See 2014 P R. Laws No. 246 Article 12 of the new law eliminates the old culpable mental states (intent and negligence) and explicitly replaces them with the four mental states in the Model Penal Code: purposely, knowingly, recklessly, and negligently Compare id. art 12 (modifying art. 22 of Law No. 146-2012), with Model Penal Code § 2 02(2); see also P.R. House of Representatives, P. del S. 1210 Informe Positivo 9 (Nov 13, 2014), http://www tucamarapr org/dnncamara/Documents/Measures/9fda6cce-88d9-4e39-a6ae-0dc163f421dc pdf

Rhode Island	"[T]he use of the word 'reckless' or 'recklessly' in penal statutes connotes something more than the negligence necessary to support a civil action for damages, and that the two words impart a disregard by the accused for the consequences of his act and an indifference to the safety of life and limb. [T]he distinguishing factor, which properly classifies the operation of a motor vehicle as reckless, is that the evidence shows that a driver has embarked upon a course of conduct which demonstrates a heedless indifference to the consequences of his action " State v Lunt, 106 R.I 379, 260 A.2d 149, 151 (R.I 1969)

The definitions of "recklessness" in the preceding chart demonstrate that the Maine definition is a perfectly ordinary, textbook definition of the term. There is nothing about the Maine statute that sets it above and beyond the standard definitions provided in the Model Penal Code, Black's Law Dictionary, and the other jurisdictions in the First Circuit Nor does it seem that the Model Penal Code and the First Circuit jurisdictions are unique in their definitions of recklessness See, e.g., Ariz Rev Stat § 13-105 ("'Recklessly' means, with respect to a result or to a circumstance described by a statute defining an offense, that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation ") (emphases added); N Y Penal Law § 15 05(3) ("A person acts recklessly with respect to a result or to a

circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation ") (emphases added) Thus, the Maine definition of "recklessness" is far from extraordinary, but rather embraces the standard, generally accepted definition of the term.

Applying that definition, I disagree with the government's assertion that "[r]ecklessly is more akin to deliberately or knowingly" than negligently The majority opinion echoes this claim, arguing that "Maine's definitions of knowingly as contrasted with recklessly differ primarily in their description of the degree of the person's awareness of the likelihood that the result will occur " Ante, at 19 The Supreme Court has held that negligent conduct cannot constitute the "use" of force See Castleman, 134 S Ct at 1414 n 8; Leocal, 543 U S at 9 On a volitional spectrum from "negligently" (clearly insufficient to constitute the "use" of force) to "intentionally" (clearly sufficient), the government and the majority seeks to place "recklessly" closer to the latter end. Yet the differences between the definitions of "recklessly" and "criminal negligence" are just as small as (if not smaller than) the differences between

"knowingly" and "recklessly " See Fernández-Ruiz, 466 F 3d at 1130 ("To the extent recklessness differs from criminal negligence, '[t]he difference between them is that criminal negligence requires only a failure to perceive a risk, as compared to the recklessness requirement of an awareness and conscious disregard of the risk.'" (quoting In re William G., 192 Ariz 208, 963 P 2d 287, 292 n 1 (Ariz Ct App 1997))); see also 1 Charles E. Torcia, Wharton's Criminal Law § 27 (15th ed. 1993) Indeed, just as Maine's definitions of knowingly and recklessly "differ primarily in their description of the degree of the person's awareness of the likelihood that the result will occur," ante, at 19 (emphasis added), so too do Maine's definitions of recklessness and negligence "differ primarily in their description of the degree of the person's awareness of the likelihood that the result will occur," id. Compare Me Rev Stat tit 17-A, § 35(3)(A) ("A person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result "), with id. § 35(4)(A) ("A person acts with criminal negligence with respect to a result of the person's conduct when the person fails to be aware of a risk that the person's conduct will cause such a result ") Therefore, I find the attempt by the government and the majority to establish that "reckless" conduct in Maine is akin to knowing, willful, or

intentional conduct, or involves a "a substantial amount of deliberateness and intent," to be unavailing

2 The Meaning of "Offensive Physical Contact"

In this context, the actus reus of "offensive physical contact" has two constituent elements: first, there must be "physical contact," and second, the physical contact must also be "offensive " Under Maine law, the physical contact required is "not limited to direct touchings, but also c[an] be effected by indirect touchings (e g , the touching of items intimately connected to the body, such as clothing or a cane, customarily regarded as part and parcel of an individual's 'person') " Nason, 269 F 3d at 19 (citing State v Rembert, 658 A.2d 656, 658 (Me 1995))

Determining whether the physical contact is "offensive" is an objective test: courts ask whether a reasonable person would find the physical contact to be offensive, under the particular circumstances involved. See United States v Pettengill, 682 F Supp. 2d 49, 56 (D Me. 2010) (stating that "'offensive physical contact' means 'physical contact which a reasonable person would find offensive under the circumstances'" (quoting Donald G. Alexander, Maine Jury Instruction Manual § 6-59 (4th ed. 2003)); see also State v Pozzuoli, 693 A.2d 745, 747 (Me 1997)) ("[T]he question is whether a reasonable person would find the contact to be offensive "); Restatement (Second) of Torts § 19 ("A

bodily contact is offensive if it offends a reasonable sense of personal dignity ") Offensive physical contact, therefore, involves "'something less than bodily injury but requires more than a mere touching of another '" Nason, 269 F 3d at 19 (alteration in original) (quoting Pozzuoli, 693 A.2d at 747)

In examining the Maine assault statute, we have previously observed that "[t]wo factors distinguish mere touchings from offensive physical contacts: the mens rea requirement, and the application of a 'reasonable person' standard to determine whether a contact is offensive " Nason, 269 F 3d at 19 (citations omitted) Accordingly, to recklessly cause an offensive physical contact in Maine, a person must consciously disregard a risk that his or her conduct will cause physical contact -- something more than a mere touching -- that a reasonable person would find to be offensive under the circumstances See Me Rev Stat tit 17-A, § 35(3)(A); Nason, 269 F 3d at 19; Pettengill, 682 F Supp. 2d at 56; Pozzuoli, 693 A.2d at 747 Moreover, the disregard of that risk "when viewed in light of the nature and purpose of the person's conduct and the circumstances known to the person, must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation " Me Rev Stat tit 17-A, § 35(3)(C)

B. The Meaning of "Use of Physical Force" Under Federal Law

1 The "Use" of "Force" and Common-Law Battery

The following discussion demonstrates that under the Lautenberg Amendment, the use-of-force requirement can be satisfied by an actus reus of an offensive touching, but such an offensive touch must be committed with a mens rea of intent rather than mere recklessness In Castleman, the Supreme Court held that "force," for purposes of the Lautenberg Amendment, incorporates the common-law meaning of "force " Castleman, 134 S Ct at 1410-11 The Court further stated that "it makes sense for Congress to have classified as a 'misdemeanor crime of domestic violence' the type of conduct that supports a common-law battery conviction " Id. at 1411 On that basis, the Court held that "the requirement of 'physical force' is satisfied, for purposes of § 922(g)(9), by the degree of force that supports a common-law battery conviction" -- including an offensive touching Id. at 1413

I agree with the government's contention that "it makes sense for Congress to have classified as a 'misdemeanor crime of domestic violence'" not only "the type of conduct that supports a common-law battery conviction," id. at 1411, but also the culpable mental states that support a battery conviction under the common law See, e.g., Freed, 401 U S at 607-08 ("'(W)here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and

adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.'" (alteration in original) (quoting Morissette v United States, 342 U.S 246, 263 (1952))); see also Sekhar v United States, 133 S Ct. 2720, 2724 (2013) ("It is a settled principle of interpretation that, absent other indication, 'Congress intends to incorporate the well-settled meaning of the common-law terms it uses '" (quoting Neder v United States, 527 U S 1, 23 (1999))) Thus, as urged by both parties here and as suggested by the Supreme Court in Castleman, I turn to examine the culpable mental states that attach to the common-law crime of battery See Castleman, 134 S Ct at 1410-11

In Johnson, the Supreme Court explained that "the common-law crime of battery consisted of the intentional application of unlawful force against the person of another " Johnson, 559 U S at 139 (emphasis added) According to Supreme Court precedent, therefore, although the Lautenberg Amendment's "force" requirement can be satisfied by an actus reus of an offensive touching, such offensive contact must involve a mens rea of intent rather than mere recklessness See id.; see also Bailey v United States, 516 U S 137, 143 (1995) (defining the word "use" for purposes of the pre-1998 text of 18 U.S C § 924(c) -- which had provided certain penalties if the defendant "uses or carries a

firearm" during a crime of violence -- and holding that such "use" required "active employment" and not "mere possession of a firearm"), superseded by statute, Bailey Fix Act, Pub. L No 105-386, 112 Stat 3469 (1998), as recognized in Abbott v United States, 562 U.S 8 (2010); Rembert, 658 A.2d at 658 (stating that "[u]npermitted and intentional contacts [are] actionable as an offensive contact"); Lynch v Commonwealth, 131 Va 762, 109 S E 427, 428 (Va 1921) ("To constitute battery there must be some touching of the person of another, but not every such touching will amount to the offense Whether it does or not will depend, not upon the amount of force applied, but upon the intent of the actor "); id. at 428 (reasoning that when a man placed his hand on a woman's shoulder after she already rejected his romantic advances, the evidence was sufficient to justify a verdict of guilt for battery due to the defendant's "willful violation of the sanctity of her person" (emphasis added)); Black's Law Dictionary 182 (10th ed. 2014) (defining tortious battery as a "nonconsensual, intentional, and offensive touching of another without lawful justification")

The sources cited by the government do not demonstrate otherwise These sources suggest, at best, that a common-law battery by "bodily injury" or "infliction of harm" can be committed recklessly; they do not establish that a common-law battery by "offensive physical contact" can be committed recklessly See,

e.g., Model Penal Code § 211 1(1)(a) ("A person is guilty of assault if he attempts to cause or purposely, knowingly or recklessly causes bodily injury to another "); Wayne R. LaFave, 2 Substantive Criminal Law § 16 2(a) (2d ed.) ("The modern approach, as reflected in the Model Penal Code, is to limit battery to instances of physical injury and cover unwanted sexual advances by other statutes "); id. § 16 2(c)(2) n.32 ("[W]ith the tort of battery an intention to injure or touch offensively is needed"); see also Commonwealth v Hawkins, 157 Mass 551, 32 N E 862, 863 (1893) (stating that "the intent necessary to constitute" an offense of assault and battery is the "intentional doing of an action which, by reason of its wanton or grossly negligent character, exposes another to personal injury, and causes such an injury," without saying anything regarding whether such an offense could be committed by causing offensive physical contact)

The weakness of the government's argument is revealed by its selective citation and selective quoting For example, the government quotes a criminal law treatise for the proposition that "a substantial majority of the battery-type statutes" in modern criminal codes "expressly state that the crime may be committed by recklessness," but conveniently omits the immediately following clause at the end of that sentence: "-- that is, where there is subjective awareness of the high risk of physical injury " LaFave, supra, § 16 2(c)(2) (emphasis added) The unabridged sentence says

nothing about whether a battery by offensive touching can be committed by recklessness Indeed, in the same section, the cited treatise states that the modern approach "limit[s] battery to instances of physical injury " Id. § 16 2(a) Furthermore, the treatise explains that the Model Penal Code's assault provision "covers only causing 'bodily injury,' on the ground that 'offensive touching is not sufficiently serious to be made criminal, except in the case of sexual assaults as provided' elsewhere in the Code " Id. § 16 2(a) n 6 (quoting Model Penal Code § 211 1 cmt at 185 (1980)) Given the foregoing, there is no justification for the majority's heavy reliance on the legislative history of the Lautenberg Amendment See, e.g., Rubin v United States, 449 U S 424, 430 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except 'in rare and exceptional circumstances '" (quoting Tenn. Valley Auth. v Hill, 437 U S 153, 187 n 33 (1978)) (internal quotation marks and citation omitted))

Contrary to the government's arguments, our decision in United States v Bayes, 210 F 3d 64 (1st Cir 2000), supports the conclusion that battery by offensive touching requires intent and not mere recklessness with respect to the offensiveness of the contact In Bayes, we evaluated the defendant's challenge to the sufficiency of the evidence to support his conviction for simple assault under 18 U S C § 113(a)(5) Bayes, 210 F 3d at 65 The

factual basis for the offense was that the defendant, Christopher Bayes, while on a Delta Airlines flight from Atlanta to England, "'put his hand on [a flight attendant's] buttocks and rubbed [her] buttocks and grabbed at the bottom of [her] buttocks,'" which a nearby passenger described as Bayes "'reaching behind the flight attendant and grabbing her in the rear end'" and "'squeezing '" Id. at 66 (second and third alterations in original) (quoting trial testimony) "Bayes persisted in being unruly despite periodic warnings from members of the crew." Id. "A scuffle ensued, ending only after the captain dumped thousands of gallons of fuel, diverted the aircraft in mid-flight, and made an unscheduled landing [in Maine] so that Bayes could be taken off the plane " Id.

Bayes argued that simple assault required "a specific kind of intent that the government failed to prove " Id. Namely, Bayes contended that "the government did not prove that he intended to injure [the flight attendant] or to threaten her with harm when he touched her on the buttocks " Id. at 67 Because the statute in question, § 113(a)(5), criminalized "[s]imple assault" but did "not define that term in any way," we "turn[ed] to the common law for additional guidance " Id. at 67-68 We stated that "the common law provided that an assault committed by way of a battery did not require an intent to cause or to threaten an injury as long as the defendant touched another in a deliberately offensive manner

without a valid reason to do so " Id. at 69 (emphasis added) We reviewed prior opinions and determined that they "support the conclusion that, in a prosecution for simple assault under § 113(a)(5), it is sufficient to show that the defendant deliberately touched another in a patently offensive manner without justification or excuse " Id. (emphases added) Therefore, we held that the evidence supported Bayes's conviction because "the jury was entitled to conclude that Bayes had groped [the flight attendant] in a way that could not have been accidental, that must have been deliberate, and that was patently offensive " Id. (emphases added)

The preceding language from Bayes reveals that the mens rea required for a § 113(a)(5) battery-by-offensive-touching conviction is intent and not mere recklessness: the defendant must "deliberately" (and not accidentally) touch the victim in a "deliberately offensive" manner See id. By contrast, under the Maine assault statutes, a defendant can commit the offense recklessly by merely disregarding (a) the risk that his conduct will cause physical contact (more than a mere touching) to occur, and (b) the risk that a reasonable person would find that physical contact to be offensive See Me Rev Stat tit 17-A, § 35(3)(A) The "deliberate" intent that we required in Bayes is thus not necessary for a conviction for recklessly committed assault or domestic-violence assault in Maine

Therefore, the following conclusion must be drawn: under the Lautenberg Amendment, the "force" requirement can be satisfied by an actus reus of an offensive touching, but such an offensive touch must involve a mens rea of intent rather than mere recklessness That is, the defendant must intend to touch and intend that the touch be offensive, rather than merely disregard the risk that a touch will occur and be considered offensive By contrast, the Maine statutes at issue permit conviction when the defendant merely disregards a risk that his or her conduct will cause physical contact that a reasonable person would find to be offensive Accordingly, applying a categorical approach and the Supreme Court's statements in Castleman and Johnson, a conviction under either of the Maine assault statutes encompasses conduct beyond the common-law definition of battery, and thus does not necessarily establish a misdemeanor crime of domestic violence under the Lautenberg Amendment This conclusion mandates reversal here and is further supported by Footnote Eight of Castleman and the circuit court cases cited therein, as explained below

2 Castleman's Footnote Eight

In Castleman, the Supreme Court opined that the "merely reckless causation of bodily injury under the [Tennessee assault statute] may not be a 'use' of force." Castleman, 134 S Ct at 1414 The Court explained this statement in Footnote Eight, noting that Leocal held that "'"use" requires active employment.'" Id. at

1414 n 8 (quoting Leocal, 543 U S at 9) The Court then stated that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient," contrasting decisions from ten other circuit courts of appeals against our opinion in Booker, which the Supreme Court listed as the only outlier [14] Together, as explained in more detail below, these cases establish that a predicate "crime of violence" under 18 U S C § 16 and analogous provisions must be committed with a degree of intentionality greater than recklessness Although § 16 is a different federal statute, its language is substantially similar to the definition of a misdemeanor crime of domestic violence for purposes of the Lautenberg Amendment In particular, the definition in § 16(a) is nearly identical to the equivalent definition for § 922(g)(9) Compare 18 U S C. § 16(a) (defining the term "crime of violence" to mean "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of

---

[14] Id. To illustrate contrast with our holding in United States v Booker, 644 F 3d 12, 19-20 (1st Cir 2011), the Supreme Court cited the following circuit court decisions in Castleman's Footnote Eight: United States v Palomino Garcia, 606 F 3d 1317, 1335-36 (11th Cir 2010); Jiménez-González v Mukasey, 548 F 3d 557, 560 (7th Cir 2008); United States v Zúñiga-Soto, 527 F 3d 1110, 1124 (10th Cir 2008); United States v Torres-Villalobos, 487 F 3d 607, 615-16 (8th Cir 2007); United States v Portela, 469 F 3d 496, 499 (6th Cir 2006); Fernández-Ruiz v Gonzales, 466 F 3d 1121, 1127-32 (9th Cir 2006) (en banc); Garcia v Gonzales, 455 F 3d 465, 468-69 (4th Cir 2006); Oyebanji v Gonzales, 418 F 3d 260, 263-65 (3d Cir 2005); Jobson v Ashcroft, 326 F 3d 367, 373 (2d Cir 2003); United States v Chapa-Garza, 243 F 3d 921, 926 (5th Cir 2001)

another"), with 18 U S C § 921(a)(33)(A) (defining a "misdemeanor crime of domestic violence" as an misdemeanor offense that "has, as an element, the use or attempted use of physical force") Keeping the similarity of the analogous statutes in mind, I review below each case cited by the Supreme Court in Castleman's Footnote Eight

a. Second Circuit

The Second Circuit considered the issue in Jobson v Ashcroft, 326 F 3d 367, 369 (2d Cir 2003), which examined whether second-degree manslaughter in New York constituted a crime of violence under 18 U S C. § 16(b) A "crime of violence" is defined in § 16(b) as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense " 18 U S.C § 16(b) [15] The Second Circuit

---

[15] Given that § 16(b)'s definition includes offenses that merely "involve[] a substantial risk that physical force may be used," id. (emphasis added), its language is far more susceptible to a reading that it encompasses reckless conduct than is the equivalent language for § 16(a) and § 922(g)(9), which both require the "use" or "attempted use" of "physical force " See supra n 2; see also 18 U S C § 16(a); id. § 922(g)(9); id. § 921(a)(33)(A); Me Rev Stat tit 17-A, § 35(3) ("A person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result "); Model Penal Code § 2 02(2)(c) ("A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct ") Therefore, the cases holding that reckless conduct is insufficient to support a subsequent § 16(b) conviction provide even stronger support for the defendants' position than do the cases involving § 16(a) Cf. Garcia, 455 F 3d at 468 (reasoning that the "use" of "physical force" requires the intentional employment of physical force, and

reiterated its previous holding that "the verb 'use' in section 16(b), particularly when modified by the phrase 'in the course of committing the offense,' suggests that section 16(b) 'contemplates only intentional conduct and refers only to those offenses in which there is a substantial likelihood that the perpetrator will intentionally employ physical force '" Jobson, 326 F 3d at 373 (internal quotation marks omitted) (quoting Dalton v Ashcroft, 257 F 3d 200, 208 (2d Cir 2001))

To satisfy § 16(b)'s definition of "crime of violence," therefore, a defendant must have risked having to intentionally use force to commit the offense Id. at 374; see also id. at 373 ("[T]he risk in section 16(b) concerns the defendant's likely use of violent force as a means to an end.") "By contrast, a defendant who is convicted of second-degree manslaughter, like other offenses of pure recklessness, may lack any 'intent, desire or willingness to use force or cause harm at all '" Id. at 374 (quoting United States v Parson, 955 F 2d 858, 866 (3d Cir 1992), abrogated on other grounds by Begay v United States, 553 U S 137 (2008)) Accordingly, the Second Circuit concluded that second-degree manslaughter in New York is not a crime a violence under

---

therefore holding that a New York second-degree reckless assault conviction "does not contain an element that there be the intentional employment of physical force against a person or thing, and thus is beyond the scope of 18 U.S C § 16(a)")

§ 16(b) and thus is not an aggravated felony justifying removal under the immigration laws Id. at 376

b. Third Circuit

The Third Circuit reached a similar result in Oyebanji v Gonzales, 418 F 3d 260, 263 (3d Cir 2005), which also involved immigration removal proceedings premised upon the definition of "crime of violence" under § 16(b) The petitioner's underlying conviction was for vehicular homicide under New Jersey law, which requires proof of recklessness Id. The Third Circuit thus stated that it was "required to decide the very question that the Leocal Court did not reach" -- "'whether a state or federal offense that requires proof of the reckless use of force against a person or property of another qualifies as a crime of violence under 18 U S C § 16.'" Id. (quoting Leocal, 543 U S at 13)

Citing the Leocal Court's distinction between "violent" crime and merely "accidental" conduct, the Third Circuit explained that "[t]he quintessential violent crimes -- murder, assault, battery, rape, etc. -- involve the intentional use of actual or threatened force against another's person, and the term 'accidental' is most often used to describe events that did not 'occur [ ] as a result of anyone's purposeful act.'" Id. at 264 (second alteration in original) (citing Black's Law Dictionary 16 (8th ed. 1999)) The Third Circuit reasoned that "accidental" conduct "is not enough to qualify as a crime of violence" under

Leocal, and it decided that such "accidental" conduct "would seem to include reckless conduct " Id. The panel further stated that the Third Circuit ought to follow the Supreme Court's "'considered dicta"' in Leocal, id. at 265 (quoting McCoy, 950 F 2d at 19), and that while the panel "appreciate[d]" the government's arguments, it "believe[d] that those arguments must be directed to the Supreme Court or Congress " Id.

c. Fourth Circuit

The Fourth Circuit considered these issues in Garcia v Gonzales, 455 F 3d 465 (4th Cir 2006) Garcia also involved removal proceedings and whether a certain predicate offense qualified as an aggravated felony by virtue of being "a crime of violence" under 18 U S C § 16 Id. at 468 The predicate offense considered in Garcia was reckless assault in the second degree under New York law, which provides that "'[a] person is guilty of assault in the second degree when (4) He recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument '" Id. (alterations in original) (quoting N Y Penal Law § 120 05) The Fourth Circuit summarily determined that the first definition of "a crime of violence" under § 16(a) -- "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another" -- did not apply to the New York second-degree reckless assault conviction Id. at 468 (quoting 18 U.S C

§ 16(a)) The court reasoned that the definition of the New York offense "does not contain an element that there be the intentional employment of physical force against a person or thing, and thus is beyond the scope of 18 U S C § 16(a) " Id. (emphasis added) Therefore, according to the Fourth Circuit, "the use of physical force" requires the intentional employment of physical force See id.

Turning to the definition in § 16(b), the Fourth Circuit held that "recklessness, like negligence, is not enough to support a determination that a crime is a 'crime of violence '" Id. at 469 In making this determination, the Fourth Circuit held that in order to satisfy § 16(b)'s requirement that the predicate offense "involve a substantial risk that physical force against the person or property of another may be used," the force must "be applied as a means to an end." Id. (quoting Bejarano-Urrutia v Gonzales, 413 F 3d 444, 447 (4th Cir 2005)) (internal quotation marks omitted); see also id. ("[W]e are of opinion that 18 U S C. § 16(b) requires that the substantial risk involved be a substantial risk that force will be employed as a means to an end in the commission of the crime, not merely that reckless conduct could result in injury ")

d. Fifth Circuit

The Fifth Circuit considered the definition of "crime of violence" under 18 U S C § 16(b) in United States v Chapa-Garza, 243 F 3d 921 (5th Cir 2001) In that case, the Fifth Circuit

reasoned that § 16(b) requires that "the offender intentionally use the force against the person or property of another " Id. at 927 Because "[i]ntentional force against another's person or property is virtually never employed to commit" the offense of felony driving while intoxicated ("DWI") in Texas, the court held that "felony DWI is not a crime of violence as defined by 18 U S C § 16(b) " Id.

e. Sixth Circuit

In United States v Portela, 469 F 3d 496, 499 (6th Cir 2006), the Sixth Circuit followed the "'considered dicta'" of Leocal and the reasoning of the Third and Fourth Circuits to hold that "a crime requiring only recklessness does not qualify as a 'crime of violence' under 18 U.S C § 16," nor, because it "uses identical language," under U.S. Sentencing Guidelines Manual (U S S G.) § 2L1 2(b)(1)

f Seventh Circuit

Similarly, the Seventh Circuit followed its sister circuits in holding that "reckless crimes are not crimes of violence under Section 16(b) " Jiménez-González v Mukasey, 548 F 3d 557, 560 (7th Cir 2008) The Seventh Circuit found persuasive the Third Circuit's reasoning in Oyebanji that the use of physical force requires active employment and not merely negligent or accidental conduct Id. (citing Oyebanji, 418 F 3d at 263) The Seventh Circuit further reasoned that "accidental and

reckless crimes are not the type of 'violent' crimes Congress intended to distinguish as worthy of removal " Id. To support its holding, the Seventh Circuit emphasized the "primary distinction" that crimes of violence involve intentional conduct whereas most crimes of recklessness involve non-purposeful conduct. See id. at 561-62

g Eighth Circuit

Likewise, the Eighth Circuit stated that the Leocal "Court's reasoning suggests that crimes requiring only reckless disregard for the risk of physical injury to another are not crimes of violence under § 16 " United States v Torres-Villalobos, 487 F 3d 607, 615 (8th Cir 2007) Examining Minnesota law, the Eighth Circuit determined that "a person can commit second-degree manslaughter without using force or risking the intentional use of force," because the crime can be committed recklessly Id. at 616 Giving examples, the court explained that:

> A person can commit this crime by recklessly leaving a child alone with lit candles that later start a fire, by allowing a child to die of dehydration while in the person's care, by leaving explosives and blasting caps stored in an automobile where they are later ignited by the use of jumper cables, and, indeed, by driving drunk with 'culpable negligence' in a manner that causes the death of a passenger

Id. (internal citations omitted) Therefore, the court held, "the 'use of force,' as Leocal interpreted that phrase, is not an element of a second-degree manslaughter conviction," meaning that

the Minnesota second-degree manslaughter offense is not a crime of violence under § 16(a) Id. Turning to § 16(b), the court also held that second-degree manslaughter under Minnesota law does not "involve a risk that the perpetrator will intentionally use physical force in the course of committing the offense." Id. at 616-17 Because Minnesota second-degree manslaughter can be committed recklessly without the intentional use of force or risking the intentional use of force, the Eighth Circuit held that it is not a crime of violence under § 16 Id. at 617

h. Ninth Circuit

In Fernández-Ruiz v Gonzales, 466 F 3d 1121, 1123 (9th Cir 2006) (en banc), the Ninth Circuit held that a prior Arizona assault conviction did not constitute a crime of violence under § 16(a) because that federal statute "covers only those crimes involving intentional conduct," and thus the merely reckless use of force (as covered by the Arizona statute) was insufficient to establish a violation See also id. ("Because the relevant Arizona statute permits conviction when a defendant recklessly but unintentionally causes physical injury to another, and because the petitioner's documents of conviction do not prove he intentionally used force against another, we conclude the federal statute does not apply ") In so holding, the court "agree[d] with [its] sister circuits that the reasoning of Leocal -- which merely holds that using force negligently or less is not a crime of violence --

extends to crimes involving the reckless use of force." Id. at 1129 The Ninth Circuit reasoned that Leocal emphasized that crimes of violence cannot be "'accidental '" Id. (quoting Leocal, 543 U S at 9) The court defined "accidental" as "'[n]ot having occurred as a result of anyone's purposeful act,'" and it defined "purposeful" as "'[d]one with a specific purpose in mind.'" Id. at 1129-30 (alterations in original) (citing Black's Law Dictionary 16, 1298 (8th ed. 2004)) The Ninth Circuit further concluded that "[r]eckless conduct, as generally defined, is not purposeful " Id. at 1130

"Even more clearly, reckless conduct as defined by Arizona law is not purposeful " Id. As support for this statement, the Ninth Circuit cited the Arizona criminal statute defining recklessness Id. Under that statute, "'[r]ecklessly' means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists " Ariz Rev Stat Ann § 13-105 (10)(c) That "risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation " Id. This definition of recklessness is substantially similar to the equivalent Maine definition, as well as the other definitions outlined in the chart in Part II(A)(1), supra For purposes of § 16, the Ninth Circuit saw no important differences

between negligence and recklessness, considering each mens rea to constitute the type of non-purposeful conduct that Leocal held was insufficient to establish a crime of violence involving the "use" of force Fernández-Ruiz, 466 F 3d at 1129-30 The court reasoned that the "plain meaning" of the word "use" denotes that "physical force is instrumental to carrying out the crime " Id. By contrast, the "subjective awareness" of risk that characterizes a reckless act "is not the same as the intentional use of physical force against the person of another " Id. The court further explained that "[t]he bedrock principle of Leocal is that to constitute a federal crime of violence an offense must involve the intentional use of force against the person or property of another " Id. at 1132 Therefore, the Ninth Circuit concluded that recklessness is not "a sufficient mens rea to establish that a conviction is for a crime of violence under § 16." Id. at 1130

i Tenth Circuit

In United States v Zúñiga-Soto, 527 F 3d 1110, 1113 (10th Cir 2008), the Tenth Circuit considered whether the "crime of violence" enhancement provision under U S S.G. § 2L1 2 applied to the appellant's prior Texas state conviction for assaulting a public servant Applying the commentary to this U S S.G provision, the Tenth Circuit's "sole task" was to whether the appellant's "prior felony conviction qualifies as a crime of violence because the offense had as an element the use of physical

force " Id. at 1115 Under the appellant's offense of conviction, a person commits an assault if he or she "intentionally, knowingly, or recklessly causes bodily injury to another " Tex Penal Code Ann § 22 01(a)(1) On appeal to the Tenth Circuit, the appellant argued that "his prior conviction did not have as an element the use of physical force because the Texas assault statute's mens rea component could be satisfied by recklessness " Zúñiga-Soto, 527 F 3d at 1115 The Tenth Circuit agreed, citing Leocal, its own precedent, and "the persuasive reasoning of [its] sister circuits " Id. at 1113, 1123

j Eleventh Circuit

Finally, applying similar reasoning, the Eleventh Circuit also relied on Leocal and the decisions of the other circuit courts to hold that "a conviction predicated on a mens rea of recklessness does not satisfy the 'use of physical force' requirement under [U S S.G.] § 2L1 2's definition of 'crime of violence '" United States v Palomino Garcia, 606 F 3d 1317, 1336 (11th Cir 2010) Citing "the near unanimity of the circuit courts on this issue," the Eleventh Circuit concluded that Leocal "plainly suggests that crimes requiring only a reckless[] disregard for the risk of physical injury to others are not crimes of violence " Id. at 1336 n 16 The Eleventh Circuit further explained that "[b]ecause Arizona law defines recklessness as nothing more than the conscious disregard of a substantial and unjustifiable risk, this is more

akin to negligence and cannot be said to require the intentional use of force " Id. at 1336 (internal citation omitted) Therefore, the court held that an Arizona conviction "predicated on the reckless causation of physical injury does not qualify as a crime of violence under [U S S.G.] § 2L1 2 " Id.

C Comparison of Analogous Statutory Language

As is evident from the discussion above, most of our sister circuits have held that the "use of physical force" requires the type of intentional conduct for which mere recklessness cannot suffice Although these cases involved different provisions than the Lautenberg Amendment, the statutory texts involved are not materially different, and in many cases, are virtually identical As referenced herein, analogous provisions to the definition of "misdemeanor crime of domestic violence" for purposes of the Lautenberg Amendment are compared in the following chart:

Statute	Relevant Language
"misdemeanor crime of domestic violence," Lautenberg Amendment, 18 U S.C § 922(g)(9)	"has, as an element, the use or attempted use of physical force" 18 U S C § 921(a)(33)(A)
"crime of violence," 18 U S.C. § 16(a)	"has as an element the use, attempted use, or threatened use of physical force against the person or property of another" 18 U S.C. § 16(a)

"crime of violence," 18 U S C § 16(b)	"any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" 18 U S C. § 16(b)
"[c]rime of violence," U S S G § 2L1 2	"[an] offense that has as an element the use, attempted use, or threatened use of physical force against the person of another" U S.S G. § 2L1.2, cmt 1(B)(iii)
"violent felony" under the ACCA, 18 U S C § 924(e)(1)	"has as an element the use, attempted use, or threatened use of physical force against the person of another" 18 U S C § 924(e)(2)(B)(I)

It is readily apparent that the language involved in most of the preceding provisions is nearly identical, and for present purposes is materially indistinguishable [16] Moreover, I do not

---

[16] The majority claims that § 16(a) is "not analogous" to § 922(g)(9) Ante, at 12 I disagree, given that these two provisions contain nearly identical language Section 16(a) defines a "crime of violence," whereas § 922(g)(9) involves a "misdemeanor crime of domestic violence " The relevant definition for § 922(g)(9) is an offense that "has, as an element, the use or attempted use of physical force " 18 U S C § 921(a)(33)(A) The definition under § 16(a) is materially indistinguishable: an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another " Id. § 16(a) This definition differs only in the addition of the "threatened use" of physical force as an alternative, and the explanation that the force be used "against the person or property of another " The former difference (the inclusion of "threatened use") is neither implicated in the current case nor in any of the analogous precedents referenced herein The latter change appears to be largely a distinction without a difference, as it is difficult to contemplate how or why the "use of physical force" for purposes of § 922(g)(9) would mean force used in any way other than "against the person or property of another "

doubt that the Supreme Court was well aware that the cases it cited in Castleman's Footnote Eight involved different provisions, yet the Court nonetheless contrasted the holdings of our sister circuits in those cases with our holding in Booker before remanding the instant cases to us for reconsideration in light of Castleman. See Castleman, 134 S. Ct. at 1414 n. 8. Thus, to the Supreme Court, these cases and provisions were sufficiently analogous to justify the instant remand. Cf. Smith, 544 U.S. at 233 ("[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."); Northcross v. Bd. of Educ. of Memphis City Sch., 412 U.S. 427, 428 (1973) (per curiam) (stating that "[t]he similarity of language" in two statutory provisions sharing "a common raison d'etre" constitutes "a strong indication that the two statutes should be interpreted pari passu"). The government and the majority fail to persuasively establish that the meaning of "the use . . . of physical force" in these various federal definitions of a "crime of violence" should be so similar in every other context, yet so different as to be outcome-determinative in the instant context. For those reasons, I find the foregoing precedent more persuasive than the majority opinion here. I thus agree with our sister circuits that the "use . . . of physical force" for a "crime of violence" requires the intentional,

and not merely reckless, employment of physical force I find this conclusion to be particularly true for the subsumed offense at issue in the instant case: the combination of a mens rea of "recklessness" with an actus reus of "offensive physical contact." Cf. Nason, 269 F 3d at 19 (stating that the mens rea requirement is one of two factors that "distinguish mere touchings from offensive physical contacts")

III Conclusion

Despite the foregoing precedent from the Supreme Court and our sister circuits, the majority opinion nonetheless seeks to hew to our prior decision in Booker and to resolve these cases, yet again, exactly as we did in Armstrong I and Voisine I With due respect, for the reasons explained above, I believe that the majority is wrong

The Lautenberg Amendment is premised upon grave concerns and laudable purposes, as articulated both by the Supreme Court in Castleman and by the majority in this case I share those concerns and strongly agree with those purposes However, a general agreement with those goals need not dictate the result here This case does not present a litmus test for judges, asking whether we oppose domestic violence and gun violence Were our job so simple, it would be an easy matter to decide in favor of the government But that is not our role. Our judicial obligations preclude us from such results-oriented decisionmaking

Rather than deciding on the basis of personal beliefs and policy preferences, or seeking to ensure that the Lautenberg Amendment encompass the broadest possible swath of conduct within its ambit, this case requires us to engage in statutory interpretation This legal task implicates the difference between Congress's broad policy goals versus the precise statutory language employed to achieve those ends That is, does the language chosen by Congress -- the "use or attempted use of physical force" -- necessarily apply to all Maine misdemeanor assault convictions for recklessly causing offensive physical contact? Applying the relevant precedent to this question of statutory interpretation counsels that we answer this inquiry in the negative and resolve this appeal in favor of the defendants I conclude that the particular subsumed Maine offense at issue here, the reckless causation of offensive physical contact, does not necessarily require the "use of physical force" and thus does not categorically constitute a misdemeanor crime of domestic violence under the Lautenberg Amendment

For the reasons stated herein, I would reverse the defendants' convictions Indeed, I believe that the Supreme Court has obligated us to do so Therefore, I respectfully dissent.

United States Court of Appeals
For the First Circuit

Nos 12-1213
12-1216

UNITED STATES OF AMERICA,

Appellee,

v

STEPHEN L VOISINE; WILLIAM E. ARMSTRONG III,

Defendants, Appellants

ERRATA SHEET

The opinion of this Court issued on January 30, 2015, is amended as follows:

On page 6, line 17, "App'x." is changed to "App'x"

On page 7, line 14, "App'x." is changed to "App'x"

On page 21, lines 15 and 24, the quotation marks are removed.

On page 22, footnote 4, line 7, "statue" is changed to "statute"

United States Court of Appeals
For the First Circuit

Nos 12-1213
12-1216

UNITED STATES OF AMERICA,

Appellee,

v

STEPHEN L. VOISINE; WILLIAM E. ARMSTRONG III,

Defendants, Appellants

ERRATA SHEET

The opinion of this Court issued on January 30, 2015, is amended as follows:

On page 12, line 11, add "To begin, § 16(a) prohibits 'use of physical force against the person or property of another,' language crucial to the Supreme Court's holding in Leocal but absent from the definition at issue here See Leocal, 543 U.S at 8-10 "

APPENDIX B

United States Court of Appeals
For the First Circuit

Nos. 12-1213
12-1216

UNITED STATES OF AMERICA,

Appellee,

v.

STEPHEN L. VOISINE; WILLIAM E. ARMSTRONG III,

Defendants, Appellants.

Before

Lynch, Chief Judge,
Torruella, Stahl, Howard, Thompson, Kayatta and Barron,
Circuit Judges.

ORDER OF COURT
Entered: March 31, 2015

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

TORRUELLA, Circuit Judge, Dissenting. I dissent from the denial of en banc hearing, as I believe that this case meets our standards for rehearing for a conflict of law, and for the reasons explained in my dissent to the panel opinion.

By the Court:
/s/ Margaret Carter, Clerk

cc: Ms. Bunker, Ms. Malone, Mr. Lowell, Ms. McGaughey & Ms. Villa